Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CLUB CAR (QUEBEC) IMPORT, INC.,
MARTIN MURPHY, PETITIONERS

v.

CLUB CAR, INC.,

AND

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The seminal case law on admissibility of expert witness testimony, *Daubert* and its progeny, sets out guidelines for determining admissibility that are flexible, both substantively and procedurally. Notwithstanding that flexibility, however, opinions of this Court clearly require an analysis that is thorough and exacting, and targets the fit between the proffered testimony and the issues in the case.

What the Eleventh Circuit countenanced in this case, on the other hand, is an admissibility determination based on factors which bear no relation to the facts and issues in the case, and which were not even identified before the exclusion of the witness. What the trial court and the Eleventh Circuit both countenanced in this case is a tardy challenge after the close of evidence, with no excuse for missing the motion *in limine* deadline other than the ambush value.

Even if that were permissible under the flexible *Daubert* procedures, the Eleventh Circuit also permitted the exclusion of expert testimony by the trial court without any authority properly before the court on which to base the exclusion, and ruled that legal argument could be offered via *ex parte* communications so long as there was no presentation of evidence. No other legal authority was ever briefed or argued prior to the exclusion. No opposing expert evidence was offered at any time. More importantly, there was no fit between the factors considered by the court and the evidence excluded. Yet the Eleventh Circuit deemed this confused proceeding an appropriate exercise of the

exacting analysis required under *Daubert*. The questions presented, therefore, are:

1. Does trial court discretion allow admissibility of expert evidence to be determined on the basis of factors that are not relevant either to the testimony or to facts and issues in the case?
2. May the trial court make a determination on admissibility of expert evidence in the total absence of opposing expert testimony or other evidence or authority properly before the court?
3. May factors and analyses supporting exclusion be supplied after the court has already ruled, without first affording the opportunity to present germane argument and evidence?
4. Does the procedural flexibility of Daubert allow a party to withhold its objection and wait in ambush until the close of evidence?
5. May an expert witness with twenty years of experience with the subject matter of his testimony be excluded on the basis that he has never before served as an expert witness?

PARTIES TO THE PROCEEDINGS

Rule 29.1

There is no parent or publicly held company owning 10 percent or more of Club Car Quebec Import Co.'s stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 11

CONCLUSION 21

APPENDIX

CIRCUIT COURT DECISION 1a

DISTRICT COURT ORDER 17a

VERDICT 80a

TRANSCRIPT EXCERPTS 84a

PLEADING 143a

DISTRICT COURT ORDER 146a

ORDER DENYING REHEARING 149a

TABLE OF AUTHORITIES

Page

CASES

ALFRED V. CATERPILLAR, INC., 262 F.3D 1083, 1087 (10TH CIR. 2001) 20

BAZEMORE V FRIDAY. 478 U.S. 385, 400, 106 S.CT. 3000, 3009 (1986) 14

CLUB CAR, INC. V. CLUB CAR QUEBEC IMPORT, INC., 362 F.3D 775 (11TH CIR. 2004) ..... *passim*

DAUBERT V MERRELL DOW PHARMACEUTICALS, INC., 509 U.S. 579, 592-93, 113 S.CT. 2786, 2796, 125 L.ED.2D 469 (1993) 3, 11, 14

GOEBEL V, DENVER & RIO GRANDE WESTERN RR CO., 215 F.3D 1083, 1088 (10TH CIR. 2000) 14, 15

KUMHO TIRE V. CARMICHAEL, 526 U.S. 137, 150, 119 S.CT. 1167, 1175 (1999) 11, 13

PADILLAS V. STARK-GAMCO, INC., 186 F.3D 412, 417-18 (3RD CIR. 1999) 14

QUIET TECH DC-8 V. HUREL DUBOIS, 326 F.3D 1333, 1341 (11TH CIR. 2003) 3

MISCELLEANOUS

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

FED. R. EVID. 702 ..... *passim*

SUPREME COURT RULES 10(a) 2

IN THE
SUPREME COURT OF THE UNITED STATES

CLUB CAR QUEBEC IMPORT, INC. and MARTIN MURPHY, *Petitioners*

v.

CLUB CAR, INC., ÉQUIPEMENTS PIERRE CHAMPIGNY, LTD.
And PIERRE CHAMPIGNY,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

Club Car Quebec Import, Inc., the Petitioner, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Opinion and Order of the United States District Court for the Southern District of Georgia denying the motions of Club Car Quebec and Martin Murphy for a new trial and judgment as a matter of law remains unreported and is reproduced at App. 17a. The March 15, 2004 Opinion of the Court of Appeals for the

Eleventh Circuit on the merits is reported at *Club Car, Inc. v. Club Car Quebec Import, Inc.*, 362 F.3d 775 (11th Cir. 2004) and is reproduced at App. 1a. The June 29, 2004 Order of the Court of Appeals for the Eleventh Circuit denying petitioners' timely request for rehearing and declining petitioners' suggestion of rehearing *en banc* remains unreported and is reproduced at App. 149a.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on March 15, 2004. The jurisdiction of the Eleventh Circuit was invoked pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 10(a&c). The Eleventh Circuit has decided important federal questions in conflict with the relevant decisions of this Court and sanctioned departures from the accepted and usual course of judicial proceedings so egregious as to invoke the supervisory power of this Court.

RELEVANT PROVISIONS

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is

the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

STATEMENT

Rule 702 of the Federal Rules of Evidence permits the admission of expert evidence helpful to the finder of fact. One purpose of such expert testimony is "to determine a fact in issue." Fed. R. Evid. 702. As elucidated under the *Daubert* line of cases, this is a "flexible" inquiry into the "fit" between the evidence proffered and the issues in the case.[1] This requires an "exacting analysis,"[2] in which the flexibility of the approach must not override the goal of determining the fit. Therefore, if the goal is to see that the evidence fits the facts and issues of the case, then the analysis must also focus on the facts and issues of the claims in the case. A determination of admissibility may not, by contrast, be based on factors which are extraneous or irrelevant to the claims for which the evidence is offered.

What is Sought

Though *Daubert* allows flexibility in the factors to be considered, evidence may not be either admitted or excluded where the relevant factors are not considered, or where factors are considered which are not relevant to the claims before the court. Where the

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[1] *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993).

[2] *Quiet Tech DC-8 v. Hurel Dubois*, 326 F.3d 1333, 1341 (11th Cir. 2003).

factors considered bear no relation to the facts and issues in the claims for which the evidence is offered, then that must be rejected as an abuse of discretion, as well as an error under Rule 702. This case should be remanded with instructions to assess damages according to the improperly excluded expert damages evidence.

Facts Material to the Questions Presented

In August of 2000, Club Car, Inc. ("Club Car") terminated and filed suit in state court against its Quebec golf car distributor, Club Car Quebec Import, Inc. ("CCQ") on an open account. The Canadian defendant, CCQ, removed the case to federal court on diversity jurisdiction and counterclaimed against Club Car. Prior to trial, CCQ moved and the court granted its motion to limit its claims in the case, eliminating claims against Club Car implicating future damages as a remedy. App 143-148a. The CCQ counterclaims remaining at trial were breach of contract, conspiracy to breach, promissory estoppel, and breach of fiduciary duty for acts by Club Car between 1997 and 2000, and unpaid commissions between 1993 and 1997. At the time of trial, these claims involved damages other than lost profits, and no *future* damages against Club Car were argued to the jury in the case. App. 144-145a, ¶¶ 1, 3, 6, 7.

Club Car joined in orally raising *Daubert* objections to CCQ's damages expert--on the last day of trial—on grounds which were not in Club Car's pre-trial expert report and of which no prior notice had been given to CCQ. App. 123-133a. The trial court

later justified the exclusion of CCQ's expert on grounds that pertained solely to future damages. App. 53-55a.

CCQ's damages expert, Peter Ryan, is a chartered accountant in Canada with twenty years' experience working with CCQ's business as accountant and financial advisor. App. 93-4, 105a. His report consisted of calculations of damages for each of the various claims in the case.

It is undisputed that Ryan submitted his expert report by the court deadline. It was updated for information later produced by Club Car in discovery, but without any change in the accounting methodology. Ryan was also deposed twice by Club Car on his qualifications, methodology, and conclusions. After these depositions, Club Car submitted its own opposing expert report, which did not question or otherwise address Ryan's methodology or qualifications. Club Car's opposing expert was deposed, and did not challenge Ryan's qualifications or methodology at that time.

Club Car had Ryan's initial report almost a year before trial, had deposed him twice, and had its own expert review all this material. Yet Club Car did not file a *Daubert* motion with respect to Ryan's testimony before the motion *in limine* deadline set by the trial court. Nor was any mention of a potential *Daubert* objection made at the pre-trial conference. App. 88-90a.

On the last day of a five-day trial, as soon as CCQ's damages expert took the stand, Club Car made a motion to exclude Peter Ryan based on his qualifications. App. 88-90a. Though this motion was

made without any prior notice or briefing, the trial court heard and granted the motion to exclude—on the grounds that Peter Ryan had not previously given expert trial testimony. App. 107-109a. Upon strenuous objection by CCQ, the trial court allowed the witness to continue his testimony while reserving its oral ruling denying admissibility. App. 138a.

Club Car did not call its expert to testify at trial. No other witness was called to dispute Ryan's testimony, qualifications, or methodology, and no other evidence was offered by Respondents on these issues.

After Ryan was excused and evidence closed, Club Car joined in another oral *Daubert* objection, on the previously undisclosed grounds that the damages expert's methodology was flawed for failure to make unspecified deductions for costs. App. 123-126a. Thus the entire trial examination, cross examination, and redirect of Ryan occurred before CCQ had any notice of this motion to exclude on the basis of his methodology.

In making this *Daubert* objection after the close of evidence, Respondents relied on a document to support their challenge which had, according to Respondents' counsel, previously been submitted to the court without CCQ's knowledge. App. 133-135a. Prior to the disclosure in Respondents' oral argument on the motion, CCQ had no knowledge of the document, which was never served on CCQ, or its submission to the court. App. 134-135a. The document submitted *ex parte* to the court, before the oral motion to exclude, was a page from a damages treatise which purportedly addressed the issue of deducting costs to arrive at damages. App. 134a.

Without further analysis, the trial court thereupon excluded CCQ's expert damages testimony in its entirety, based on the argument that unspecified costs should have been deducted. App. 135-137a. There was no evidence, legal authority, or other discussion as to which, if any, costs were relevant to each of the claims in this case. The court made no specific findings, except that Ryan had not made additional deductions from his margin figures on past damages. In particular, no distinction was made between the various categories of damages Ryan testified to, such as depressed margins and the valuation of CCQ's business. App. 111-113, 117-120a. Nor were Ryan's stated reasons for not deducting additional costs from other damages addressed. *Id.* at 119-120, 122a. Ryan's reasons for stating that incremental expenses would be insignificant were never disputed by any opposing expert or other evidence.

In fact, less than five minutes elapsed between the oral *Daubert* motion on methodology and the exclusion of the expert witness. App 123-137a. The exclusion of Ryan, on an oral motion after the close of evidence, eliminated virtually all of CCQ's damages evidence. App. 139-141a.

Despite the exclusion of CCQ's damages expert, the jury found Club Car liable for its wrongful conduct to CCQ. App. 81a. Thus, unlike many *Daubert* cases, the exclusion of the expert did not affect the liability determination. It did drastically limit the amount of damages the jury could award to CCQ on its counterclaims. App. 139-141a.

CCQ filed a motion for a new trial, challenging Ryan's exclusion on substantive and procedural grounds. In denying this motion, the trial court, for first time, offered legal authority and cited accounting methodology factors supporting exclusion. These included the failure to discount *future* damages to present value, or to deduct incremental costs from future damages. App. 53a. Future damages theories were not argued in the case against Club Car at trial, but only damages from the 1993-2000 claims. App. App. 144-145a, ¶¶ 1, 3, 6, 7.

The order denying CCQ's motion for a new trial also cited a failure to adjust for inflation, a factor never mentioned in the *Daubert* argument at trial. App 55a. The order does not specify which damages should have been adjusted for inflation. At no time, either at trial or in post trial orders, have the present value or inflation factors been distinguished with respect to their impact on the 1993-2000 damages asserted by CCQ, as opposed to future damages.

The court also cited Ryan's failure to conform to accepted accounting procedures, though no evidence was offered by any accountant, or other witness, on that issue. App. 55a. The court further opined that Ryan did not conform to tax accounting principles, though no taxation issues were involved, and no evidence was offered at trial on this subject, either. *Id.*

Finally, the court criticized Ryan, for the first time in its post-trial order, for failing to deduct revenues that "would have been generated" despite Club Car's wrongful acts. App 53a. No evidence or authority was offered on this factor at trial. These

revenues, or the reasons for deducting them, have never been identified by Club Car or the trial court, at any time.

None of following issues cited by the trial court for the first time in the post-trial order, discounting to present value, adjustment for inflation, subtracting other CCQ revenues, procedures accepted by the accounting community, or methods of tax return preparation, were identified prior to Ryan's exclusion, and no evidence or argument was presented on any of them.

The trial court did cite in its order the same general statement concerning failure to deduct costs, but, as at trial, it did not identify the costs that allegedly should have been deducted with any specificity. Nor did it address in the order the reasons stated by Ryan, undisputed by any other evidence, for not deducting additional costs.

Despite the lack of analysis or findings in the trial record, and the lack of germane factors submitted after the trial to justify exclusion of the expert, the Eleventh Circuit dismissed CCQ's appeal argument saying the trial court "reasonably concluded [Ryan's] lost profit calculation was based on flawed methodology that was unaccepted in the accounting community." [3] App. 5a. The Eleventh Circuit did not address the lack of any evidence or authority as to what the accounting community did or did not accept, or the fact that Ryan

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[3] *Club Car, Inc. v. Club Car Quebec Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004)

testified to damages theories other than lost profits. App at 4-7a.

The Eleventh Circuit also approved the procedures followed by the trial court in making its ruling, as follows:

"The trial court permitted extensive voir dire and cross examination, then heard lengthy argument on Ryan's methods. The court adequately developed the record necessary to exercise sound discretion and did not err in holding the *Daubert* hearing during trial."[4] App. 6a.

The "lengthy argument on Ryan's methods" and "adequately developed record" from the "Daubert hearing held during trial" on --from the making of the oral motion on Ryan's methodology to the oral order in which the trial court "sustain[ed] the motion to strike [Ryan's] opinion as to damages"--is reproduced in its entirety at App. 125-137a.

The Eleventh Circuit also held that Respondents' *ex parte* "attempt by...counsel to submit an excerpt from a handbook on damages" was harmless because it did not involve presentation of evidence, but only of "legal authority in support of [Respondents'] argument."[5] App 6a.

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[4] 362 F.3d at 781.

[5] 362 F.3d at 781.

REASONS FOR GRANTING THE WRIT

Question 1. Does trial court discretion allow admissibility of expert evidence to be determined on the basis of factors that are not relevant either to the testimony or to facts and issues in the case?

The job of the trial court under Rule 702 of the Federal Rules of Evidence is to ascertain whether expert testimony "pertain[s] to a fact at issue in the case" and whether the expert's "reasoning or methodology can be applied to the facts in issue."[6] To serve that function in all cases, this must be a flexible inquiry.[7] However, the gatekeeping inquiry must be "tied to the facts of a particular case."[8] By the same token, the trial court's admissibility analysis should also have "a valid...connection to the pertinent inquiry."[9]

By contrast, the trial court here excluded CCQ's damages expert, Peter Ryan, for failure to deduct unspecified costs, without any analysis tied to the facts of the case. In its first articulation of the factors it considered to find Ryan's methodology flawed, in response to *post-trial* motions, the trial court enumerated a series of factors with absolutely no relevance to the issues argued at trial. It faulted Ryan for failing to discount future damages to present value, though CCQ made no claim of future damages against

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[6] *Daubert*, 509 U.S. at 592-93, 113 S.Ct. at 2796.
[7] 509 U.S. at 594, 113 S.Ct. at 2797.
[8] 509 U.S. at 591; *Kumho Tire v. Carmichael*, 526 U.S. 137, 150, 119 S.Ct. 1167, 1175 (1999)
[9] *Kumho Tire*, 526 U.S. at 149, 119 S.Ct. at 1175.

Club Car at trial.[10] App. 53, 143-145a. The court also cited Ryan's failure to adjust for inflation, another factor with no discernible bearing on past damages--unless it means they should have been increased. [11] Similarly, the trial court's undirected recitations concerning revenues CCQ would have had despite Club Car's misconduct cannot be matched up with any specificity to CCQ's past damages or any other facts or issues in the case. App. 53, 55a.

This lack of fit is not surprising given the total absence of evidence or argument that marred this determination of admissibility.[12] The entire record of the *Daubert* objection based on Ryan's methodology consists of an oral motion after the close of evidence (App. 123-136a), followed by a discussion whether such a tardy challenge can be brought without a more searching examination of the witness' testimony through the adversarial process. App 127-131. At the conclusion of that colloquy the trial court *admits* the expert evidence. App. 131a.

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[10] Even if future damages theories had been argued at trial, the present value discount would apply to those damages only, not to past damages, from 1997 to 2000, which were central to the case, and certainly would not be a basis to "sustain the motion to strike [Ryan's] opinion as to damages." App. 137a. The trial court never made any such distinction between past and future damages, either at trial or post-trial, and neither did the Eleventh Circuit.

[11] It is not altogether clear how this inflation-adjustment factor should have been applied to the future damages with which the court was purportedly concerned, either.

[12] As considered more fully elsewhere, these analytical shortcomings were exacerbated by the tardiness of Respondents' *Daubert* challenge, which was not made until the last day of trial.

That ruling is followed by a renewed oral objection from Respondents' counsel, culminating in the disclosure of an "attempt by [Respondents'] counsel to submit" *ex parte* "legal authority in support of his argument." App. 131-135a; *Id.* at 6a.[13] After a brief discussion in which the trial court dismisses CCQ's argument that Club Car failed to put up any expert evidence that Ryan's accounting methodology departed from accepted standards, the trial court stuck Ryan's expert opinion evidence on damages *in its entirety.* App. 137a. The hearing concludes with a discussion of whether the court has directed a verdict since no damages evidence remains in the case. App. 137-142a. CCQ's attempted objections are cut off when the trial court states it has "heard enough." App. 141.

That brief record can be searched in its entirety without finding any exacting analysis of the fit between the expert evidence and the claims and issues in the case. As Justices of this Court have previously stated, the trial court's latitude in performing the gatekeeping function is "not discretion to perform the function inadequately."[14]

The Eleventh Circuit, however, ignored both the failure to consider relevant factors in the *Daubert* analysis and the failure to establish a record.[15] Before excluding CCQ's expert damages testimony, the court never did identify which costs should have been

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[13] *Club Car, Inc. v. Club Car Quebec Import, Inc.*, 362 F.3d 775, 781 (11th Cir. 2004).

[14] *Kumho Tire*, 526 U.S. 137, 152, 119 S.Ct. 1167, 1175 (Justices Scalia, O'Connor and Thomas concurring).

[15] 362 F.3d at 780-81

deducted or how they applied to theories of liability as diverse as breach of fiduciary duty and failure to pay commissions.[16] The post-trial rationales, such as failure to adjust for inflation, departed entirely from the cost-deduction issue the court relied on at trial.[17] Thus these later-identified factors only compounded the confusion promulgated at trial.

Neither the trial court nor the Eleventh Circuit ever considered the reasons given by the expert, who handled CCQ's business affairs for twenty years, for not deducting additional costs.[18] Moreover, this Court has already established that failure to consider all possible cost variables in a study goes to the weight of the evidence, not its admissibility.[19] Therefore, the main rationale supported by the Eleventh Circuit for excluding the witness was not a proper consideration for admissibility. Club Car was free to attack Ryan's conclusions on cross examination,[20] which it did, or to

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[16] *Goebel v, Denver & Rio Grande Western RR Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000)(without specific findings or discussion on the record, it is impossible to determine whether the district court meticulously reviewed the expert evidence "or simply made an off-the-cuff decision."

[17] *Padillas v. Stark-Gamco, Inc.*, 186 F.3d 412, 417-18 (3rd Cir. 1999) ("side trying to defend the admission of an expert must be given an adequate opportunity to do so").

[18] App. 118, 120, 122a (specifically finding, uncontradicted by any other evidence, that incremental costs from additional sales would be minimal).

[19] *Bazemore v Friday*. 478 U.S. 385, 400, 106 S.Ct. 3000, 3009 (1986) (failure to consider all cost variables goes to probativeness, not admissibility).

[20] *Daubert* makes it clear that the Rule 702 analysis is not intended to supplant the role of cross examination and presentation of evidence on disputed issues. 509 U.S. at 596, 113 S.Ct. at 2798.

offer expert evidence that the methodology was unsound, which it did not.

The Eleventh Circuit must be reversed for the legal error in excluding the expert for a cost deduction rationale that is contrary to the precedent of this Court in *Bazemore v. Friday*. More importantly, this case cannot be allowed to set a precedent for straying beyond the analysis of relevant factors in performing the Rule 702 gatekeeping function. The boundaries set by *Daubert* and *Kumho Tire* are wide, but the Eleventh Circuit strayed far outside them when it allowed past damages to be excluded because future damages—of which none were presented to the jury--were not discounted to present value. Analysis of expert testimony must be brought back inside the lines shaped by the requirement that the evidence, and the admissibility analysis of that evidence, must fit the facts and issues of the case.

Question 2. May the trial court make a determination on admissibility of expert evidence in the total absence of opposing expert testimony or other evidence or authority properly before the court?

In keeping with the "fit" requirements of *Daubert*, it would appear that "off-the cuff" judgments by the trial court have no place in this inquiry.[21] In this case, however, the trial court had nothing else on which to rely.

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[21] *Goebel*, 215 F.3d at 1088.

There was absolutely no evidence before the court on accounting standards, and certainly no evidence that Ryan's methodology did not satisfy those standards. In this case, the court's failure to dig deeper left unexposed the fact that Club Car's opposing accounting expert, who was not called to testify, did not disagree with Peter Ryan's methodology. It also did not take into account Ryan's own explanations for why he did not deduct additional costs from his margin figures. App. 118, 120, 122a. This is a danger that lurks wherever the inquiry is limited to the trial judge's own understanding without the aid of opposing expert evidence.[22]

Despite these obvious shortcomings, the Eleventh Circuit found the court "adequately developed the record to exercise sound discretion."[23] App. 6a.

At trial, however, the only legal authority offered for exclusion of the witness was not properly before the court. This consisted of a page from a damages treatise which, according to Respondents' counsel, was "given to the court earlier," without CCQ's knowledge, and before any objection to admissibility for failure to deduct costs. App. 133-134a.

The Eleventh Circuit dismissed the importance of Club Car attempting to make an argument to the court of which CCQ had no notice. The Eleventh Circuit justified this action by saying that the

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[22] App 129 & 58a (it's "common sense), 55a (trial judge's personal knowledge of tax accounting).

[23] *Club Car*, 362 F.3d at 781.

document, given to the court under unknown circumstances, was "not evidence, but legal authority supporting [Respondent]'s argument."[24] App 6a. Surely the Eleventh Circuit cannot be correct that *ex parte* legal argument is acceptable during the course of a trial.

Professionalism considerations aside, this method of advancing arguments flies in the face of the exacting analysis requirements of *Daubert*. Take away the questionable submission and there was no legal authority whatsoever offered, before the court's ruling, in support of excluding the witness. The authority cited in the later orders was not identified prior to Ryan's exclusion, and was never applied to these facts or otherwise tested in the adversarial process.

While the procedural and substantive requirements of *Daubert* must remain flexible to fit the facts and issues of any case, a bright line can be drawn here: that there must be some evidence or authority before the court to analyze prior to its ruling. Where,

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[24] *Id.* In addition, the Eleventh Circuit termed this a question of whether CCQ was properly served. However, this is not a case in which CCQ had timely notice of the argument to the court in advance of the motion, but merely was not served properly. CCQ had no knowledge of the document, its transmission to the court, or the coming motion to exclude which the document was submitted to support. When legal authority is submitted to the court in advance, without CCQ's knowledge, and the ruling turns on the argument advanced, that is not merely an issue of whether CCQ was "properly served." *Id.*

as here, there was nothing properly before the court to consider, that should be ruled an abuse of discretion.[25]

Question 3. May such factors and analyses supporting exclusion be supplied after the court has already ruled, without first affording the opportunity to present germane argument and evidence?

This case is notable for more than the lack of a fit between the issues in the case and the factors justifying exclusion of the expert, or for the tardiness of the challenge, the absence of opposing evidence, and the brevity of the proceedings. What is truly remarkable is that the factors justifying the court's ruling—such as the failure to discount *past* damages to present value--were never identified until after the ruling excluding the expert was already made. The same is true of the legal authority cited by the trial court in its post-trial order. It was never cited or argued prior to Ryan's exclusion.

There is an inherent danger in this that may not be understated. While the failure to tailor the analysis to the facts and issues in the case is by itself an abuse of discretion, permitting after-the-fact justification is only asking for abuse.

By their very nature, supporting rationales which are not identified until after a ruling is already

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[25] This Court can also draw the bright line the Eleventh Circuit failed to draw, that legal authority not properly before the court is inexcusable and cannot be, or even appear to be, a basis for exclusion.

made, cannot be tested by the adversarial process. There can be no presentation of facts or arguments to probe the fit between the factors cited and the facts of the case. There can be no opportunity to distinguish legal authority *vis à vis* the facts of the case. By definition, there could not possibly be any "exacting analysis," as required under *Daubert*.

Such post facto justifications only undermine the credibility, legitimacy, and appearance of impartiality that are essential to federal court proceedings.

No other case could better illustrate the extreme danger such proceedings pose to the judicial system itself. Conclusory, after-the-fact rationales for exclusion, that have never passed muster in the adversarial process, must be deemed an abuse of discretion.

Question 4. May the party seeking exclusion, without excuse, withhold its objection, and any notice of its basis, from the party offering the expert testimony until the conclusion of the trial?

The Eleventh Circuit opinion never addressed the question why Club Car filed a *Daubert* motion on the last day of trial after letting the motion *in limine* deadline pass, after failing to give any prior notice, and after presenting no opposing expert evidence of its own.

This encourages a lack of professionalism, and weakens the adversarial process. The predictable result of such surprise objections is the slipshod analysis and shoddy procedure demonstrated in the

instant case, where evidence of past damages was excluded because it was not "discounted to present value." This cannot be the course courts follow, or the ambush tactics parties are allowed to use, in determining admissibility under *Daubert*.

The prejudice one might predict from allowing such tardy motions was borne out in this case, a breakdown in the adversarial process evidenced by the total absence of a developed record, authority properly before the court, exacting analysis that fit the facts and issues in the case, or specific findings by the court. The Eleventh Circuit never considered any of these issues, merely citing the trial court's unfettered discretion in the timing of *Daubert* proceedings, where clearly a bar to such unprofessional tactics was called for, instead.

The Tenth Circuit, in addressing such dilatory tactics, stated that "only in rare circumstances" should such "tardy motions" even be considered by the court.[26] The Tenth Circuit noted that "the law does not traditionally reward ambush trial tactics," and that "Daubert generally contemplates a gatekeeping function, not a 'gotcha' function."[27] In *Goebel*, as here, the defendant missed the motion *in limine* deadline and moved to strike the expert after the plaintiff rested.[28]

This Court should establish a procedural line that bars such abuses from occurring under the guise of trial court discretion. It can do so by adopting the Tenth Circuit's suggestion that *Daubert* challenges filed after

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[26] *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2001).
[27] *Id.*
[28] *Id.* at 1086.

motion *in limine* deadlines set by the court, without any justification offered, be barred as untimely. Otherwise, parties will be free to follow Club Car's example in abusing the procedural flexibility of the *Daubert* inquiry to gain an unfair advantage, partly, as here, from the confused nature of the resulting last-minute trial proceedings.

Question 5. May an expert witness with twenty years of experience with the subject matter of his testimony be excluded on the basis that he has never before served as an expert witness?

Prior to excluding CCQ's expert damages testimony based on methodology, the trial court excluded Ryan for lack of prior experience as an expert witness. App 109a. This basis for exclusion is troubling just because the law is so clear that one does not have to be a professional expert witness to be qualified.[29] The exclusion of Ryan on his qualifications is a clear and reversible error of law that was never addressed by the Eleventh Circuit. This blatant legal error was a prescient and glaring symptom of the confused proceedings on methodology that were about to follow. Such haphazard conduct of *Daubert* proceedings should be held an abuse of discretion.

CONCLUSION

The reason *Daubert* has remained a flexible inquiry is so that courts can tailor their procedures and substantive inquiries to the facts and issues in the

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[29] Fed. R.Evid. 702 (expert can be qualified by experience in the field).

whole spectrum of cases that come before them. That is the correct approach, and this Court should not tamper with that flexibility as long as it is directed to those purposes. However, when that discretion and flexibility becomes a shield for failing to tailor the factors analyzed to the issues relevant to the claims in case, that is where this Court must step in and draw the line by calling that an abuse of discretion. And the Eleventh Circuit opinon in the instant case, above all, must not become the bellwether for "anything goes" in *Daubert* admissibility determinations—late filings, *ex parte* communications, absence of authority, failure to make specific findings, after-the-fact justifications, and consideration of factors irrelevant to the claims in the case--under the guise of trial court discretion.

The Supreme Court should accept this petition for certiorari not because this case presents a difficult, close, or intellectually challenging question, but because it presents a question that is so stark and simple, but urgently in need of clarification to prevent abuse, and to preserve the integrity of this Court's decisions in *Daubert* and *Kumho Tire*. There simply must be minimum standards of fairness, openness, and relevance in *Daubert* proceedings.

The factors considered must fit the facts of the case. The court must develop a truly adequate record to determine admissibility. Absent some surprise development, the challenge should be timely, with evidence and authority presented on a timely basis and fairly argued, without even the appearance of impropriety in the proceedings.

For these reasons and those set forth above, the petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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Attorneys for Petitioners

(any footnotes trail end of each document)
No. 03-11169
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CLUB CAR, INC.,
Plaintiff-Counter Defendant-Appellee,

Versus

CLUB CAR (QUEBEC) IMPORT, INC., MARTIN MURPHY,
Defendant-Counter Claimant-Appellant,

MARTIN MURPHY,
Defendant-Appellant,

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,
Counter-Defendants-Appellees,

INGERSOLL RAND CO., LTD.,
Counter-Defendant.

March 15, 2004, Decided
March 15, 2004, Filed

COUNSEL: For Club Car (Quebec) Import, Inc, Appellant: Penn, Darren W., ATLANTA, GA.

For Murphy, Martin, Appellant: Humphrey, Stephen, Cook, Noell, Tolley, Bates & Michael, LLP, ATHENS, GA. Scherffisu, Andrew M., ANDREW M. SCHERFFIUS, P.C., ATLANTA, GA. Harris, Jeffrey R., Butler, Wooten, Overby, et al., Savannah, GA.

For Club Car, Inc, Appellee: Ellington, James B., Hull, Towill, Norman & Barrett, Augusta, GA.

For Pierre Champigny, Appellee: Snell, Amy R., Fulcher, Hagler, Reed, et al, AUGUSTA, GA.

JUDGES: Before EDMONDSON, Chief Judge, BIRCH and FARRIS *, Circuit Judges.

OPINIONBY: FARRIS

OPINION: FARRIS, Circuit Judge:

Club Car of Quebec (CCQ) and its president, Martin Murphy, appeal the judgment against them on several claims arising out of Club Car Inc.'s termination of CCQ as its distributor of golf carts. We affirm.

Background

Under a series of written distribution agreements, CCQ, a Quebec corporation, served as the Quebec distributor of golf carts manufactured by Club Car, a Georgia corporation, from 1980 through 2000. In 1990 and 1991, CCQ president Martin Murphy executed a personal guaranty to ensure payment of CCQ's debts.

During the 1990's Club Car and CCQ agreed that Club Car could sell used carts in Quebec, but that CCQ would have a right of first refusal on those products. If CCQ declined to purchase them, it would receive a commission on each cart Club Car sold to another buyer. Disagreements later arose when Club Car began selling used carts containing new parts to a competitor, Equipements Pierre Champigny (EPC). This

arrangement ended in 1997, but Club Car continued selling used carts.

In 1999, Club Car began charging CCQ a Quebec Provincial Sales Tax (QST) for its products with the stated intent of remitting the taxes to the Quebec Government. For various reasons, Club Car delayed paying the taxes until June of 2001. CCQ claims it suffered tax penalties as a result of this delay.

In 2000, Club Car terminated its contract with CCQ and awarded the distributorship to EPC, whose president is Pierre Champigny. Later, Club Car filed suit to recover more than $ 1.5 million in payments due from CCQ and from Murphy under the personal guaranty. CCQ and Murphy filed three lengthy counter claims against Club Car asserting, among other claims, breach of contract, conspiracy to breach a contract, and conversion arising out of the distribution agreement, as well as breach of fiduciary duty, violations of federal and state RICO laws, and fraud arising out of Club Car's mishandling of the QST taxes. CCQ later joined EPC and Champigny as counterclaim defendants, alleging tortious interference with a business relationship and contract, and conspiracy to breach a contract.

On January 17, 2003, the trial court granted Club Car's motion for partial summary judgment, dismissing CCQ's RICO and fraud claims, and its breach of contract claim connected with the alleged used cart agreement. On January 31, EPC and Champigny moved to apply Quebec law to CCQ's claims against them. On February 3, CCQ moved to amend the pretrial order, agreeing to limit its claims against Club Car to breach of contract, conspiracy to breach a contract, breach of

fiduciary duty, and promissory estoppel, and to limit its claims against Champigny and EPC to conspiracy to breach a contract and tortious interference with a business relationship and contract. On February 4, the trial court accepted CCQ's limitation of claims and granted EPC and Champigny's request to apply Quebec law.

After a five-day trial, a jury awarded Club Car $ 1,557,360 (Canadian) on its claims against CCQ and Murphy. The jury awarded CCQ $ 100,000 (Canadian) on its counterclaims against Club Car, but nothing on its claims against EPC and Champigny. The jury did not award attorney fees to either Club Car or CCQ. After trial, the trial court granted Club Car's motion for judgment as a matter of law and awarded Club Car attorney fees under the distribution contract.

DISCUSSION

1. Damages Testimony. n1

CCQ challenges rulings excluding testimony on the alleged damages connected with its various counter claims. It first contends that the trial court abused its discretion in striking the expert testimony of its accountant, Peter Ryan, on lost profits under Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). We review such rulings for abuse of discretion, Judd v. Rodman, 105 F.3d 1339, 1341 (11th Cir. 1997), and will reverse only if an erroneous ruling created a "substantial prejudicial effect." Piamba Cortes v. American Airlines, Inc., 177 F.3d 1272, 1305 (11th Cir. 1999) (citations omitted).

Expert testimony is admissible if (1) the expert is qualified to testify on the topic at issue, (2) the methodology used by the expert is sufficiently reliable, and (3) the testimony will assist the trier of fact. ER 703; Quiet Tech. DC-8 v. Hurel-Dubois UK, Ltd., 326 F.3d 1333, 1340-41 (11th Cir. 2003). To ensure that a proper foundation is made, the trial court must screen expert testimony to determine if it is relevant and reliable. Daubert, 509 U.S. at 589. Expert testimony must be excluded if the reasoning or methodology underlying the opinion is scientifically invalid, or if the methodology cannot properly be applied to the facts. Id. at 592.

Ryan testified that CCQ's damages in the form of lost profits exceeded $ 10 million. But, as the trial court found, that estimate was based on gross sales and gross profit figures. Ryan admitted he had not factored in expenses CCQ would normally incur in generating income and sales. To recover lost profit damages in Georgia, "one must show the probable gain with great specificity as well as expenses incurred in realizing such profits. In short, the gross amount minus expenses equals the amount of recovery. " Shaw v. Ruiz, 207 Ga. App. 299, 428 S.E.2d 98, 103 (1993) (citations omitted). Ryan failed to follow this rule. The trial court reasonably concluded his lost profit calculation was based on flawed methodology that was unaccepted in the accounting community. *See* Daubert, 509 U.S. at 593-94 (degree to which experts in the field accept technique relevant to admissibility). The court did not abuse its discretion in striking the testimony.

CCQ argues the *Daubert* objection was untimely because it was not raised until trial. A *Daubert*

objection not raised before trial may be rejected as untimely. Quiet Tech., 326 F.3d at 1350. But a trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing a *Daubert* motion during trial. *See* Goebel v. Denver and Rio Grande Western R.R. Co., 215 F.3d 1083, 1087 (10th Cir. 2000)(trial court may hold *Daubert* hearing "when asked to rule on a motion in limine, on an objection during trial, or on a post-trial motion. . . ."); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) ("the trial judge must have considerable leeway" in determining whether expert testimony is reliable). The trial court permitted extensive voir dire and cross examination, then heard lengthy argument on Ryan's methods. The court adequately developed the record necessary to exercise sound discretion, and did not err in holding the *Daubert* hearing during trial. CCQ argues the trial court's ruling was based on improper evidence, pointing to the attempt by EPC's counsel to submit an excerpt from a handbook on damages. CCQ claims this tainted the court's ruling because the excerpt was not properly served on the parties. This contention is without merit: The excerpt was not "evidence" but legal authority in support of EPC's argument. Moreover, the trial court indicated it had not even seen the excerpt when it made its ruling.

CCQ next complains that the trial court confused the jury in striking Ryan's lost-profit testimony as follows:Members of the jury, with respect to Mr. Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved and merely used the gross amount, his opinion as to the loss on the Defendant's counterclaim is stricken. You are not

to consider that.CCQ claims the instruction failed to distinguish between lost profit and other damages, thereby misleading the jury into disregarding all of Ryan's testimony. Since CCQ failed to object to the instruction, reversal is required only if it can show plain error. Fed. R. Civ. P. 51; Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1287-88 (11th Cir. 2002). Although not a model of clarity, the instruction did refer to Ryan's conclusions that failed to account for CCQ's expenses. The instruction was not so misleading as to clearly prejudice CCQ. Ford, 289 F.3d at 1288.

Finally, the trial court did not commit reversible error in sustaining Club Car's objection to Ryan's testimony on losses CCQ allegedly suffered from Club Car's handling of QST taxes. CCQ vice president Anita Murphy had already testified that CCQ incurred more than $ 200,000 in fines and expenses due to Club Car's failure to remit QST to the Quebec Government. Ryan's testimony was cumulative and its exclusion was harmless. Piamba Cortes, 177 F.3d at 1305.

2. Jury Instructions .

CCQ claims the trial court abused its discretion in the "process and substance" of instructing the jury, focusing mainly on the relationship between Quebec law and its claims. It first argues that the trial court's "untimely" decision to apply Quebec law to its claims against EPC and Chamigny "spawned confusion" and prejudice. This argument is without merit. To avoid unfair surprise, a party must give reasonable notice, through its pleadings or otherwise, of its intent to rely on foreign law. Fed R. Civ. P. 44.1; DP Aviation v. Smiths Industries Aero. & Def. Sys., 268 F.3d 829, 846 (9th Cir. 2001). EPC gave

CCQ such notice at least twice, starting two weeks before trial. Moreover, in granting EPC's request, the court did not "change" the law; it simply applied well-established choice-of-law principles to claims that CCQ, a Quebec party, had against other Quebec parties. CCQ received reasonable notice. DP Aviation, 268 F.3d at 846.

Nor did the trial court err in denying CCQ's request to amend the pretrial order a second time so that it could reassert claims for defamation and bad faith business negotiations under Quebec law. "For pretrial procedures to continue as viable mechanisms of court efficiency, appellate courts must exercise minimal interference with trial court discretion in matters such as the modification of its [pretrial] orders." Jacobs v. Agency Rent-A-Car, Inc., 145 F.3d 1430, 1432 (11th Cir. 1998) (quoting Hodges v. United States, 597 F.2d 1014, 1018 (5th Cir. 1979)). CCQ had agreed to drop those claims before trial in order to streamline its lengthy list of counter claims. The court did not abuse its discretion in refusing to amend the pretrial order again after trial had begun.

We also find no reversible error in the trial court's refusal to give CCQ's proposed Quebec law instructions on its breach of fiduciary duty and conspiracy claims against Club Car. For the most part, the instructions CCQ proposed merely added the following statements to the Georgia version of the law:Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in his duty,

he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral, or material in nature.This added little to the instructions given, which already stated that Club Car had a legal duty to refrain from conspiring to breach its contracts, and a duty to fulfill its fiduciary obligations by using reasonable care in handling QST funds collected from CCQ. Assuming Quebec law applied to the claims, any error in refusing to give CCQ's proposed instructions is harmless since they would not have altered the thrust of what the jury was told. *See* Carter v. DecisionOne Corp., 122 F.3d 997, 1005 (11th Cir. 1997) (instructional error does not require reversal unless we are "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.") (quoting Johnson v. Bryant, 671 F.2d 1276, 1280 (11th Cir. 1982)).

CCQ also claims, with little analysis or citation to relevant authority, that the trial court gave various flawed Quebec law instructions. But CCQ fails to show how, considered as a whole, the instructions misstated the law or misled the jury. Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1569 (11th Cir. 1991).n2

Nor did the trial court violate Fed R. Civ. P. 51 by failing to hold a proper charge conference or allow CCQ sufficient time to review and object to proposed instructions. Before closing arguments, the trial court held a hearing at which all parties argued the instructions. Although the court abbreviated the hearing, it gave the parties an additional opportunity to object and propose new instructions after the jury was charged. The proceedings were consistent with Fed. R. Civ. P. 51.

3. QST Claims

CCQ argues that the trial court erred in dismissing on summary judgment its state RICO and fraud claims connected with Club Car's handling of the QST it collected. We review summary judgment rulings de novo, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. Tullius v. Albright, 240 F.3d 1317, 1319 (11th Cir. 2001). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." Clemons v. Dougherty County, 684 F.2d 1365, 1369 (11th Cir. 1982).

To establish a pattern of racketeering activity under Georgia's RICO statute, CCQ needed to prove two related predicate acts that violated state or federal law. Ga. Cod. Ann. § 16-14-3(8), (9); Roth v. Connor, 235 Ga. App. 866, 510 S.E.2d 550, 557 (1998). n3 CCQ alleged that Club Car committed mail fraud, which requires proof of a specific intent to defraud or deceive. 18 U.S.C. § 1341; United States v. Hasner, 340 F.3d 1261, 1269 (11th Cir. 2003). CCQ's common law fraud claim has a similar scienter element. Empire Distr. Inc. v. Hub Motor, 240 Ga. App. 568, 524 S.E.2d 264, 265 (1999).

In support of summary judgment, Club Car presented evidence that it began collecting QST on the advice of its customs auditor in the Spring of 1999. Club Car's accountant explained the delay in remitting the tax by

averring that: (1) shortly after Club Car began collecting QST, she was notified she could not remit the tax without a Quebec Provincial tax identification number; (2) she was not diligent in applying for the number because she was overworked and having personal problems; (3) the Quebec government rejected a defective application submitted in the Fall of 2000; (4) she resubmitted a corrected application in December 2000; and (5) an identification number was issued to Club Car in May 2001. All taxes were paid in June 2001, before CCQ filed its counterclaim alleging fraud.

In response, CCQ was required to come forward with "specific facts showing that there [was] a genuine issue for trial." Fed. R. Civ. P. 56(e). Instead, CCQ asserts only that the delayed payment raised an inference of fraudulent intent, and refers to what it claims are invoices containing false tax numbers submitted by Club Car. But the delay was explained by Club Car's affidavits. Moreover, CCQ does not identify the invoices that allegedly contain false numbers. There were invoices containing a tax number associated with the financing entity for the transaction, which was listed as "buyer" on the invoices. CCQ fails to show how listing the tax number of a clearly-identified party evidences fraudulent intent. At best, this is nothing more than a scintilla of evidence and is insufficient to defeat summary judgment. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Contrary to CCQ's claim, the affidavit of Anita Murphy, which asserted that Club Car had falsified tax numbers and was unauthorized to collect QST, does not establish a question of fact as to intent. The trial court correctly

disregarded this averment as barred by the hearsay rule because Murphy had attempted to relay what she claimed Quebec government officials had told her. Inadmissible hearsay generally cannot be considered on a motion for summary judgment. Macuba v. Deboer, 193 F.3d 1316, 1322 (11th Cir. 1999).

CCQ also asserts that summary judgment was improperly granted because the trial court had erroneously denied CCQ's request to depose certain Club Car employees on the QST issue. CCQ fails to explain how the discovery rulings were erroneous or how the witnesses would have supported its claims. *See* Flanigan's Enterprises, Inc. v. Fulton County, 242 F.3d 976, 987 n.16 (11th Cir. 2001) (party's failure to elaborate on or provide any citation of authority in support argument constitutes waiver) (citation omitted); *see also* Fed. R. App. P. 28(a)(9)(A). n4

CCQ next contends that the trial court erred in excluding the trial testimony of Lynda Cappadoccia of the Quebec government on the QST issue. The trial court made no such ruling. Instead, a magistrate denied CCQ's pretrial request to take Cappadoccia's videotaped deposition for trial, a ruling that CCQ failed to appeal to the district court. *See* Farrow v. West, 320 F.3d 1235, 1248-49 n.21 (11th Cir. 2003) (failure to appeal magistrate's nondispositive order to the district court precludes party from raising issue on appeal to the circuit court).

Finally, CCQ argues that the trial court abused its discretion in excluding as hearsay Anita Murphy's testimony that Quebec tax officials "had learned" that

Club Car used false tax numbers and was unauthorized to collect QST. These were "out of court statements offered to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The trial court properly excluded them. *See* Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1554 (11th Cir. 1995) (trial court has broad discretion in determining admissibility of evidence).

4. Personal Jurisdiction: Murphy.

Martin Murphy argues that the district court lacked personal jurisdiction because he is a resident of Quebec without sufficient minimum contacts with Georgia. The Georgia long-arm statute provides for personal jurisdiction over a nonresident defendant who "transacts any business within this state." Ga. Code Ann. § 9-10-91(1). The statute confers jurisdiction to the "maximum extent permitted by due process." SES Indus., Inc. v. Intertrade Pack. Mach. Co., 236 Ga. App. 418, 512 S.E.2d 316, 318 (1999). Due process requires that a defendant have sufficient minimum contact with the forum state to provide "fair warning that a particular activity may subject him to the jurisdiction of a foreign sovereign." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citation omitted). In determining whether sufficient minimum contacts exist, we look to whether: (1) the defendant has acted so as to avail himself of the law of the forum state; (2) the claim is related to those acts; and (3) the exercise of jurisdiction does not violate notions of fair play and substantial justice. SES Indus., 512 S.E.2d at 318.

A nonresident individual cannot be subject to personal jurisdiction based solely upon acts in Georgia taken in

his or her corporate capacity. Southern Electronics Distrib. v. Anderson, 232 Ga. App. 648, 502 S.E.2d 257, 260 (1998). Murphy's contacts with Georgia went beyond his visits to the state as CCQ president. Murphy engaged in negotiations with Club Car for the underlying distribution agreements as well as the personal guaranty. As the trial court found, Murphy was more than a passive participant in CCQ's dealings in Georgia. As principal and primary shareholder of CCQ, Murphy enjoyed the substantial financial benefit from the distribution agreement, which he induced Club Car to enter by personally guaranteeing CCQ's debts. Notably, the distributorship agreement and the personal guaranty contract, in effect for many years, provided for their enforcement in the state of Georgia, under Georgia law. These circumstances establish that Murphy acted to avail himself of Georgia law, the claim is related to those acts, and it was fair for Georgia to assert jurisdiction over him. *See* White House v. Winkler, 202 Ga. App. 603, 415 S. E. 2d 185 (1992). The trial court correctly found that Murphy had sufficient minimum contacts with Georgia.

5. Attorney Fee Award-Validity of Personal Guaranty

Finally, CCQ and Murphy challenge rulings awarding attorney fees to Club Car and rejecting Murphy's claims that the personal guaranty contract was unenforceable. Both issues arose in rulings on motions for judgment as a matter of law entered after the initial judgment was entered and the initial notice of appeal was filed. In light of this, CCQ and Murphy were required to amend their notice of appeal to designate the rulings and amended judgment affected by those rulings. Fed. R. App. P. 4(a)(4)(B)(ii). They amended their notice, but failed to

designate the rulings and judgment they now challenge.

Fed. R. App. P. 3(c) requires a notice of appeal to "designate the judgment, order or part thereof appealed from." We have jurisdiction to review only those judgments or orders specified-expressly or impliedly-in the notice of appeal. Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1374-75 (11th Cir. 1983). Where a notice of appeal specifies a particular judgment or ruling, we infer that others are not part of the appeal. Id. The failure to designate the post-trial rulings on attorney fees and the personal guaranty precludes CCQ and Murphy from challenging them in this appeal. n5

AFFIRMED.

- - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

n1 Martin Murphy joins in all of CCQ's claims that would result in an offset of the jury's award to Club Car under his personal guaranty.

n2 CCQ also claims the court erroneously instructed the jury that "all tortious conduct by Club Car and Champigny. . . had to occur in the state of Georgia" for the jury to award damages. The court gave no such instruction. It did instruct the jury that punitive damages could only be based upon conduct occurring in Georgia.

n3 Under Ga. Code Ann. § 16-14-4(a), Georgia's RICO statute:it is unlawful for any person, through a pattern

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of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.

n4 CCQ tests the limits of Fed. R. App. P. 28(a)(9)(A) throughout its briefs.

n5 Murphy's challenge to personal jurisdiction is not similarly-barred because he raised the issue in at least two pretrial motions to dismiss. "The appeal from a final judgment draws in question all prior non-final orders and rulings which produced the judgment." Barfield v. Brierton, 883 F.2d 923, 930 (11th Cir. 1989).

CIVIL ACTION NO. CV100-195

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
AUGUSTA DIVISION

CLUB CAR, INC.,
Plaintiff,

v.

CLUB CAR (QUEBEC) IMPORT, INC., and
MARTIN MURPHY,
Defendants.

and

CLUB CAR (QUEBEC) IMPORT, INC.,
Counterclaim Plaintiff,

v.

CLUB CAR, INC., PIERRE CHAMPIGNY,
EQUIPEMENTS PIERRE CHAMPIGNY, LTD.,
and INGERSOLL RAND CO.,
Counterclaim Defendants.

5/4/2003

O R D E R

Club Car Quebec ("CCQ") and Martin Murphy have filed motions for a new trial under Rule 59 and for judgment as a matter of law under Rule 50 (b).
On February 14, 2003, a jury returned a verdict in favor

of Plaintiff, Club Car, Inc. ("Club Car"), on its claims against CCQ and Murphy and against CCQ in its counterclaims against Pierre Champigny and Equipements Pierre Champigny, Ltd. ("IEPCII").[1] For the reasons that follow, the Court will DENY the Rule 50 and Rule 59 motions of Murphy and CCQ.

BACKGROUND

Club Car designs and manufactures golf carts and their parts for sale or lease through authorized distributors and direct channels. From the early 1980s until 2000, CCQ was an authorized distributor of Club Car's golf carts and parts pursuant to a series of distributorship agreements. Murphy is the president and principal shareholder of CCQ.

Under the distributorship agreements, which continued until September 1, 2000, CCQ distributed Club Car's golf carts and parts in Quebec and elsewhere in Canada. The distributorship agreements provided that CCQ would order new golf carts and parts from Club Car in Augusta, Georgia, for delivery either to CCQ's principal place of business or directly to its customers. Club Car extended a credit line to CCQ in the course of their business relationship, and the parties regularly exchanged orders, payments, and commissions. In 1990, Club Car and Murphy executed a personal guaranty to ensure payment by either Murphy or CCQ on golf carts and parts ordered by CCQ and provided by Club Car on credit.

In the early 1990s, Club Car and CCQ reached an oral agreement under which CCQ would have a right of first refusal on all of Club Car s used golf carts sold within

its territory. If CCQ declined to purchase the used carts under its right of first refusal, it would receive a $100 commission on each cart subsequently sold in its territory. A disagreement over the nature of the arrangement arose in 1996 and resurfaced again in June 1997, when Murphy wrote to Ray Bentley[2] to complain about the sale of used golf carts to Pierre Champigny. After consulting with his supervisors, Bentley elected to end the used cart arrangement between Club Car and CCQ. Murphy was notified by letter that the arrangement would end on December 31, 1997.[3] Despite the urging of Murphy at a sales seminar in August 1997, Bentley declined to reconsider the decision to terminate the arrangement.

In addition to the distributorship agreements concerning golf carts, Club Car and CCQ also engaged in a series a written agreements concerning the distribution of utility vehicles, or "carryall" vehicles.[4] The last distributorship agreement concerning carryall vehicles expired on February 28, 1989.

In 1998, an interest arose in renewing the utility vehicle distributorship agreement. Club Car contends that interest in a new agreement originated on the part of CCQ and Murphy, while CCQ contends that Club Car contacted it to express interest in renewing the agreement. In any case, Dave Marmelstein, then a regional manager for Club Car, met with Murphy in the summer of 1998 to discuss the possibility of CCQ becoming a utility vehicle dealer. CCQ contends that an oral agreement concerning a utility distributorship was reached at that meeting, while Club Car's position is that the meeting was only informational in nature and resulted in Marmelstein directing Murphy to formulate

a business plan concerning the proposed dealership. Marmelstein never received the business plan. CCQ did receive utility vehicles from Club Car for sale between 1998 and 2000, but Club Car contends that no distributorship agreement was in place.

The carryall vehicle is distinct from the golf cart in that it is designed for industrial, rather than personal, use. CCQ contracted to sell Club Car's turf utility vehicles. Since early 1999, Club Car has been charging CCQ a Quebec Provincial Sales Tax ("QST") for products shipped by Club Car into the Canadian province of Quebec. Joan Speering, an accountant employed by Club Car, was responsible for handling Canadian tax matters and maintaining the general ledger where CCQ's QST payments were recorded. Speering contacted the province of Quebec concerning the submission of QST payments and was told that she would need a QST identification number before she could remit QST funds. Speering, however, did not send an application for a QST identification number until August or September, 2000.[5] When she did send in an application, she did so incorrectly. The necessary corrections were made to the application and it was submitted on December 12, 2000.

Club Car received its identification number five months later, on May 11, 2001. Speering then issued a check for the tax due, and the province of Quebec negotiated the check on July 9, 2001.

In 2000, Club Car terminated its relationship with CCQ and awarded the distributorship for the Quebec province to EPC. Club Car sold used golf carts to EPC

in the late 1990s and packaged the used carts with new parts as an incentive for EPC to purchase the carts. EPC refurbished the used carts with the new parts and sold the used carts in Quebec, the same geographic market in which CCQ was the exclusive distributor of new Club Car carts.

Club Car filed the instant action in the superior court of Columbia County, Georgia, on August 29, 2000, seeking to recover more than $1.5 million for goods delivered to CCQ for which Club Car was never paid. CCQ and Murphy removed the case to this Court and filed a motion for dismissal, which the Court denied. CCQ and Murphy then filed three lengthy counterclaims against Club Car and three new Counterclaim Defendants -- Champigny, EPC, and Ingersoll Rand Company, Ltd. ("IRCL") alleging breach of contract, wrongful termination of contract, tortious interference with business relations, tortious interference with the prospective sale of business, conspiracy, conversion, breach of fiduciary duty, violations of federal and state RICO laws, and fraud.

On January 17, 2003, the Court issued an Order on five motions for summary judgment in which the Court dismissed CCQ' s federal and state RICO claims, common law fraud claims, and claims against IRCL. In addition to ruling that CCQ's claims under federal and state RICO claims fail as a matter of law, the Court found its exercise of personal jurisdiction over Murphy to be proper, and, in denying CCQ's motion for summary judgment, the Court found that the used cart agreement between CCQ and Club Car was unenforceable because of its indefinite duration and non-compliance with the statute of frauds.

In the pre-trial status conference, CCQ narrowed its counterclaims voluntarily, limiting its charges to be considered at trial to claims of breach of contract, conspiracy, tortious interference with a business relationship, tortious interference with a contract, promissory estoppel, and breach of fiduciary duty. CCQ' s contentions at trial were that Club Car breached its distributorship agreement with CCQ by providing used carts and new parts to EPC, that EPC and Club Car conspired to interfere with the distributorship agreement, that Champigny and EPC tortiously interfered with CCQ's business relationship and contract with Club Car, that CCQ relied to its detriment on representations made by Club Car concerning the future of its contractual relationship with CCQ, and that Club Car violated its fiduciary duty to CCQ in its handling of the QST funds.

Trial in this case was held before a jury from February 10, 2003, until. February 14, 2003. On the evening of February 14, the jury returned a general verdict in which it awarded $1,557,360 (Can.) to Club Car in its claim against CCQ and $100,000 (Can.) to CCQ in its counterclaim against Club Car.

On March 26, 2003, the Court entered an order granting Club Car's motion for judgment as a matter of law and awarding Club Car attorney's fees under the distributorship agreement and Martin's personal guaranty.

DISCUSSION

I. RULE 50 AND RULE 59 STANDARDS

Under Rule 50(b) of the Federal Rules of Civil

Procedure, a movant may renew a motion for judgment as a matter of law made at the close of evidence and prior to a jury verdict by filing a motion within ten days of entry of judgment. When evaluating a motion for judgment as a matter of law, a court must consider all of the evidence and reasonable inferences arising therefrom in the light most favorable to the nonmoving party. E.g., Carter v. DecisionOne Corp. Through C.T. Corp. System, 122 F. 3d 997(11th Cir. 1997).

In considering whether to grant a judgment as a matter of law, courts

consider whether such sufficient conflicts exist in the evidence to necessitate submitting the matter to the jury or whether the evidence is so weighted in favor of one side that one party must prevail as a matter of law. Although [courts] look at the evidence in the light most favorable to the non-moving party, the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions.

Thosteson v. U.S., 304 F.3d 1312, 1316-17 (11th Cir. 2002); Brochu v. City of Riviera Beach, 304 F.3d 1144, 1154-55 (11th Cir. 2002).

(It is the jury's task - not ours - to weigh conflicting evidence and inferences, and determine the credibility of witnesses. If reasonable jurors could reach different results, we must not second--guess the jury or substitute our judgment for its judgment.);

Silvera v. Orange Count Sch. Bd. , 244 F. 3d 1253, 1257-

58 (11th Cir. 2001).

Rule 50(b) allows a renewed motion for judgment as a matter of law to be filed jointly with a motion for new trial under Rule 59(a) of the Federal Rules of Civil Procedure.

Fed. R. Civ. P. 50(b). Under Rule 59(a),
[a] new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . .

To grant a new trial motion, the Court must find "the verdict [to be] contrary to the great weight of the evidence." Hicks v. Talbott Recovery. Sys., Inc., 196 F.3d 1226, 1242 (11th Cir. 1999). However, the Court is not allowed to substitute its credibility decisions for that of the jury, for "[t]he right to trial by jury would be substantially impaired if a jury's verdict could be set aside because it is based on evidence that the trial judge weighed differently." Hewitt v. B.F. Goodrich Co., 732 F.2d 1554, 1558-59 (11th Cir. 1984). Thus, the Court's discretion to grant a Rule 59(a) motion is exceedingly narrow. Id. at 1559.

Murphy and CCQ have filed motions for judgment as a matter of law under Rule 50 and for a new trial under Rule 59. The Court will consider each Defendant's motions separately.

II. MARTIN MURPHY

As grounds for relief in his Rule 50 and Rule 59

motions, Murphy asserts that the Court did not hold a jury charge conference, that the Court violated the Rule 51 requirement that jury instructions be distributed to counsel prior to closing argument, that the jury charge concerning Murphy's personal guaranty was misleading, that the merger clause in the 1992 distributorship agreement between Club Car and CCQ terminated the personal guaranty, that the personal guaranty was not enforceable because it was of indefinite duration, that the Court improperly allowed the presentation of evidence concerning Murphy's finances at trial, that the Court lacked personal jurisdiction over Murphy, that the scheduling order for the case inconvenienced and prejudiced Murphy, and that Murphy was medically unfit to stand trial. The Court will consider each issue in turn.

A. Charge Conference

Murphy first asserts that "[t]he Court did not hold a charge conference, but presented its charges, formulated without review or argument by the parties, and concluded the charge conference before CCQ had even read the charges." The record, however, indicates that the Court did hold a charge conference on the morning of February 14, 2003, prior to issuing the charges to the jury. Trial Tr., vol. V, at 4-17. At the conference, the Court heard objections from Murphy's counsel. Id. Furthermore, Murphy's counsel had the opportunity to express his exceptions to the jury charges at the close of instructions and before the jury retired to deliberate. Trial Tr., vol. V, at 53-56. Murphy cites no procedural rule or caselaw requiring a charge conference of a particular length, and the Court is aware of no such requirement in Rule 51 or elsewhere.

More importantly, Murphy's counsel offered no objection to proceeding with jury instructions after the conclusion of the charge conference.

"Necessarily, the trial judge has a certain degree of latitude in determining how, and at what point in time, to conduct a charge conference." United States v. Pelullo, 964 F . 2d 193, 200 (3d Cir. 1992) . So long as counsel is given the opportunity to make objections, the Court retains the prerogative to elicit those objections at any time before the jury retires to deliberate. See id. ("While the rule does not specify whether objections should be made before or after the court instructs the jury, inherent in the rule is the requirement that, at either time, some opportunity be afforded."). Rule 51 merely requires the " [o]pportunity . . .be given to make the objection out of the hearing of the jury." The record indicates that Murphy's counsel was allowed the opportunity to object, both at the charge conference and after the instructions had been delivered to the jury. Murphy's counsel had adequate time to review the charges and form its objections before the jury retired to deliberate. Thus, because the Court finds that Murphy was given sufficient opportunity to object to the Court's jury instructions, Murphy may not obtain relief on this ground.

B. Timing of Closing Arguments

Murphy next points out that his counsel "was not advised of the [jury] charges prior to closing argument as required by Fed. R. Civ. P. 51." Doc. 434 at 2. Under Rule 51,

[alt the close of evidence or at such earlier time during

the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

Fed. R. Civ. P. 51. While Murphy's counsel is correct in stating that it was not given a written copy of the jury charges before closing arguments, a new trial is an inappropriate remedy in a case such as this where Murphy did not object at the time of closing arguments and he was not prejudiced by the timing of the arguments.

"If a district judge fails to articulate the instructions to counsel prior to closing arguments, counsel must attempt to persuade the district judge to reveal the planned instructions or counsel will lose the opportunity to show prejudice." Siddicli v. Leak, 880 F.2d 904, 910 (7th Cir. 1989). Indeed, with respect to any procedural error, '[a] litigant may not, speculating on a verdict without making objection, keep silent while matters are transpiring in the trial court . . . . " Ford v. United Gas Corp., 254 F . 2d 817, 818 (5th Cir. 1958). "It is the duty of counsel by objection to call such threatened or actual departure to the judge's attention, and invoke his corrective action, and, if overruled, to make it appear that prejudice has resulted." Id. Accordingly, ""[f]ailure to adhere to Rule 51 . . . does not require a new trial when a party fails to object to the sequence or fails to show prejudice." Matherne v. Wilson, 851 F. 2d 752, 762 (5th Cir. 1988); accord Kestenbaum v. Falstaff Brewing Corp., 575 F. 2d 564, 574 (5th Cir. 1978); Luther v. Maple, 250 F. 2d 916, 920 (8th Cir. 1958); Western Machinery Co. v.

Consolidated Uranium Mines Inc., 247 F.2d 685, 689 (10th Cir. 1957) ; Gwinett v. Albatross S. S. Co.,243 F.2d 8, 9 (2d Cir. 1957).

Not only did Murphy's counsel fail to object when the Court proceeded with closing arguments before issuing jury instructions, Murphy also cannot show prejudice resulting from any non-compliance with Rule 51. Prejudice may be established with a showing that the Court's error "hinder [ed] [counsel] in their ability to present summations which fully dealt with the issues to be placed before the jury." Wiedersum Assocs. v. National Homes Constr. Corp. , 540 F. 2d 62, 666 (2d Cir. 1976); see United States v. Eisen, 974 F.2d 246, 256 (2d Cir. 1992) ("If the rule is violated, reversal is required where the defendant can show that he was 'substantially misled in formulating his arguments' or otherwise prejudiced." (quoting United States v. Smith, 629 F.2d 650, 653 (10th Cir. 1980))).

The Court, however, is not required by Rule 51 to inform counsel of its precise jury instructions in advance of closing arguments or to provide counsel with an advance copy of the instructions. Jones v. Southern Pac. Railroad, 962 F.2d 447 (5th Cir. 1992) ; Emerick v. U.S. Suzuki Motor Corp., 750 F.2d 19, 22-23 (3d Cir. 1984) ; Beimert v. Burlington Northern Inc., 726 F. 2d 412, 414 (8th Cir. 1984) ; see Siddigi, 880 F.2d at 910 ("If counsel had adequate notice of the substance of the instructions to be given, a failure to precisely comply withRule 51 would be harmless and we will not order a new trial under those circumstances without a showing of material prejudice."). The Court may provide counsel with the substance, though not the particular wording, of the instructions, "so that they can

make effective closing arguments and tender any objection." Jones, 962 F.2d at 450; see Williams v. Independent News Co., 485 F. 2d 1099, 1106 (3rd Cir. 1973) (finding no prejudice where counsel "was forewarned prior to his closing jury speech as to the critical instructions which were ultimately delivered by the court").

Murphy contends that he was unaware of how the Court would charge the jury on matters of Quebec law prior to his closing argument. The Court, however, issued two written orders in the course of the trial clarifying which law would apply to which claims in the case. In a February 11, 2003, order addressing CCQ' s and Murphy's motion "for determination of foreign law," the Court clarified its pretrial ruling that "the locus of CCQ' s alleged injuries was the Canadian Province of Quebec, and that Quebec law accordingly should apply to CCQ's tort claims against EPC and Pierre Champigny." Doc. 403 at 2.

In a second order issued on February 11, the Court further clarified the law applicable to the claims in the case:

[T] he tort claims levied by CCQ against EPC are to be determined according to the law of Quebec. Georgia law will be applied to all other claims in this case, including the contract claim of Club Car in the original complaint, the breach of contract claim filed by CCQ against Club Car, the promissory estoppel claim filed by CCQ against Club Car, the claim related to Quebec Sales Tax filed by CCQ against Club Car, and the conspiracy claims filed by CCQ against Club Car and EPC.

Doc. 404 at 3. The Court proceeded to charge the jury accordingly, with Quebec law applying to the tort claims brought by CCQ against EPC and Champigny and Georgia law applying to all other claims in the case. Jury Inst. at 12-28.

The Court clarified the law of this case in the pretrial conference where it ruled that Quebec law would apply to CCQ' s claims in tort against EPC and Champigny, Docs. 375, 402, and in two separate orders issued on the second day of trial. Counsel had two full days after the Court clarified the law of the case before closing arguments proceeded. Counsel for Murphy was aware of the substance of the jury instructions prior to closing argument and, in fact, had taken the opportunity to object to the Court's rulings on the substance of the jury instructions. Doc. 392. Thus, according to prevailing caselaw, the Court complied with the requirements of Rule 51 by alerting counsel to the substance of the jury instructions before closing argument.

Murphy, nevertheless, claims that a dispute had arisen between his counsel and EPC's counsel concerning the precise language of applicable Quebec law. Both EPC and Murphy presented amended requests to charge the jury after the Court ruled on the law that would be applied to the issues of the case. Docs. 380, 387, 399, 408. The amended requests to charge were filed in order to inform the Court on Quebec law and its applicability to the issues of the case.

The Court notes initially that neither party filed jury instructions regarding Quebec law that marked a significant departure from the common law applied to

tort claims in the State of Georgia. Using the proposed jury instructions submitted as a guide, the Court cannot conceive of a different outcome on the liability side of Murphy's claims against EPC and Champigny whether Georgia or Quebec law had been applied Com are Doc. 380, EPC Revised Requests to Charge 6-16 (applying Quebec law to tort claims) with Doc. 353, EPC Requests to Charge 6-12 (applying Georgia law to tort claims). Murphy's revised jury requests, in fact, were nearly identical to their prior requests under Georgia law on tort issues.[7]

Because their revised requests appeared less argumentative than those presented by EPC and Champigny, the Court patterned its jury instructions on tort claims primarily from Murphy's and CCQ's requests. For example, in his request to charge on the issue of tortious interference with a business relationship, Murphy provided that

[t]o prove a claim for tortious interference with business relations, Club Car Quebec must prove that Pierre Champi gny (1) acted improperly and without privilege, (2) acted purposely and with malice with the intent to injure, (3) induced Club Car not to enter into or continue a business relationship with the plaintiff, and (4) caused plaintiff financial injury.

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in his duty, he is responsible for any injury he causes to another

person by such fault and is liable to reparation for the injury, whether it be bodily, moral, or material in nature.

Tortious interference with business relations i s a distinct and separate tort from that of tortious interference with contractual relations so proof of a valid and enforceable contract is not required as an element of a cause of action for tortious interference with business relations. You may find that Pierre Champigny interfered with Club Car Quebec's business relations even if you do not find that the distributor agreement was a contract.

Malice is a term to be given a liberal meaning; malicious or maliciously means an unauthorized interference, or any interference without legal, justification or excuse. Personal ill will or animosity is not essential to establish malice.

A cause of action for tortious interference with business relations encompasses interference with future business relationships as well as existing ones, and liability may result not only from disruption of the relationship but also from elimination of the injured party's ability to perform.

To establish a cause of action for interference with future business relations a party must demonstrate that absent the alleged interference, those relations were reasonably likely to develop or continue.

A person's business is property, and a person is entitled to have such property protected from tortious interference by a third person who, in interfering, is not

acting in exercise of some right.

Doc. 355, Request 5. The emphasized portions of Murphy's requested charges represent language used either verbatim or in substance in the Court's jury instructions.

The Court's instructions to the jury on the issue of tortious interference with business relations were as follows:

To recover for tortious interference with business relations, CCQ must establish each of the following elements by a preponderance of the evidence

1. Some improper action or wrongful conduct by EPC or Champi gny without privilege;

2. That EPC or Champigny acted purposefully and with malice with the intent to injure CCQ's business;

3. That EPC or Champigny induced a party or a third party not to continue a business relationship with CCQ; and

4. That EPC's or Champigny's tortious conduct proximately caused financial injury to CCQ.

For purposes of these types of torts, "improper actions" constitute conduct wrongful in itself. Thus, improper conduct means wrongful action that generally involves predatory tactics, such as physical violence, fraud or misrepresentation, defamation, use of confidential information, and unwarranted criminal prosecutions. "Privilege" means legitimate economic interests of

EPC. "Malice" means the intent to injure CCQ's business.

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

It is not unlawful, however, for a company to compete against another company. The exercise of an absolute legal right is not and cannot be considered an interference with a business relationship. The mere fact that one's activity has caused economic impact to another business does not mean that the other business may recover. A business is obliged to suffer losses resulting from lawful competition.

The theory of the tort of interference with business relations is that the law draws a line between lawful competition and vindictive destruction of someone else's business. A systematic effort to induce Club Car to end its business relationship with CCQ and to use EPC as a distributor instead is unlawful when the purpose of such inducement is to cripple or destroy CCQ rather than to further a legitimate business relationship with Club Car.

A cause of action for tortious interference with business relations encompasses interference with future business relationships, as well as existing ones, and liability may result not only from disruption of the relationship but also from elimination of the injured party's ability to perform. CCQ must demonstrate that absent any interference by EPC or Champigny, the business relations that were allegedly lost to CCQ were

reasonably likely to continue. Tn other words, in order to find for CCQ on this claim, you must find that Club Car's business relationship with CCQ was reasonably likely to continue but for the interference of EPC or Champi gny.

Tortious interference with business relations is a distinct and separate tort from that of tortious interference with contractual relations, so proof of a valid and enforceable contract is not required as an element of a cause of action for tortious interference with business relations. You may find that Champigny or EPC interfered with CCQ's business relations even if you do not find that the Distributor Agreement was valid or breached.

Jury Inst. at 15-18. The emphasized portions of the jury instructions are taken either in substance or verbatim from Murphy's requested charges.

In his request to charge on his other tort claim, tortious interference with a contract, Murphy submitted the following charge request:

In Count 6, Club Car Quebec further alleges that EPC tortiously interfered with Club Car Quebec's contractual relationships in assisting Club Car in breaching the distributorship agreement by receiving from Club Car, and then selling, new parts and refurbished one year old carts. EPC denies that it assisted Club Car in breaching the agreement.

You must decide whether Pierre Champigny torti ously interfered with Club Car Quebec's contractual relations related to the distributorship.

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in his duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral, or material in nature.[8]

Tortious interference with contractual relations requires a contractual relationship. To prevail, Club Car Quebec must establish that EPC engaged in improper action or wrongful conduct without privilege, acted purposely and with malice with intent to injure, and induced a breach of contractual obligations or made a contract more difficult to perform, and damages.Intentional and non-privileged interference by a third party with a contractual right or relationship need not result in a breach of the contract to be actionable; it is sufficient if the invasion retards performance of the duties under the contract or makes performance more difficult or expensive.

A party contractually bound to render performance has a property interest in the contract in that he has the right to render the required performance free from unjustified and unprivileged intentional invasions that retard performance or make it more difficult or expensive; such interference constitutes an actionable tort.

Interference with contractual rights, such as inducing one to breach his contract with another, is an actionable

tort.

Doc. 355, Request 6. The emphasized portions of Murphy's requested charge were included either in substance or verbatim in the Court's jury charges.

The Court issued the following instructions to the jury on the issue of tortious interference with an existing contract:

CCQ further alleges that EPC tortiously interfered with CCQ's contractual relationships in assisting Club Car in breaching the Distributor Agreement by receiving from Club Car, and then selling, new parts and refurbished used cars. EPC denies that i t assisted Club Car in breaching the Agreement. You must decide whether Champigny tortiously interfered with CCQ's contractual relations pertaining to the distributorship.

Tortious interference with contractual relations requires a contractual relationship. To prevail, CCQ must establish that EPC engaged in improper action or wrongful conduct without privilege, acted purposely and with malice and intent to injure, and induced a breach of contractual obligations or made a contract more difficult to perform, and damages.

Intentional and non-privileged interference by a third party with a contractual right or relationship need not result in a breach of the contract to be actionable; i t is sufficient if the invasion retards performance of the duties under the contract or makes performance more difficult or expensive.

A party contractually bound to render performance has

a property interest in the contract in that he has the right to render the required performance free from unjustified and unprivileged intentional invasions that retard performance or make it more difficult or expensive. Such interference constitutes an actionable tort.

Jury Instr. at 18-19. The entirety of the jury instruction on this issue was adopted verbatim from Murphy's requested charges.

Comparison of Murphy's requests to charge and the instructions submitted by the Court to the jury indicate that Murphy's requested charges were included substantially in the Court's instructions. In such circumstances, Murphy cannot complain of prejudice resulting from the timing of the submission to counsel of the complete jury instructions. See Beard v. Mitchell, 604 F.2d 485, 493 n.8 (7th Cir. 1979) (finding no error where plaintiff claimed that judge improperly advised him of instructions, where "most of plaintiff's instructions were given in substance").

Murphy cannot claim to have been surprised by the Court's instructions to the jury on the Quebec law issues. The Court apprized counsel for each party on what the substance of the charges would be during the trial, and the Court substantially used Murphy's requested charges in its instructions to the jury. See Siddigi, 880 F.2d at 910 (finding no prejudice where, though the judge "did not clearly state what instructions he would give, counsel for both parties were apprised of his thoughts on what issues would be presented to the jury").

To summarize, the Court made counsel for each party aware of the applicable law of this case, and thus of the substance of its jury instructions, in orders issued during the trial and prior to closing arguments. Under prevailing law, the Court is required only to alert counsel to the substance of the charges, not to provide a written, finished copy of the charges prior to closing arguments. Even if the Court did violate Rule 51 in failing to apprize counsel of the jury instructions prior to closing arguments, Murphy cannot make the requisite showing that his counsel objected to proceeding with closing arguments. Furthermore, Murphy cannot show prejudice resulting from any violation of Rule 51. The similarity between Quebec and Georgia tort law, and the near identity of the Court's jury instructions and Murphy's proposed charges, render harmless any Rule 51 error. Murphy may not obtain relief on this ground.

C. Personal Guaranty Charge

Murphy next challenges the Court's charge with regard to his personal guaranty. According to Murphy, the Court should have charged that the jury is to determine whether the personal guaranty remained in effect since 1991, not whether it was properly executed and enforceable in 1991.

The Court's instructions with regard to the personal guaranty and its enforceability were as follows:

Club Car contends that Martin Murphy has individually guaranteed CCQ's debts to Club Car as specified in his personal guaranty. A contract of guaranty is one whereby a person-in this case, Martin Murphy-

obligates himself to perform the obligation of another-in this case, CCQ-in consideration of a benefit flowing to the guarantor or other benefits given to his principal. A guarantor is jointly and severally liable with his principal unless the contract provides otherwise.

To recover damages against Martin Murphy based on his personal guaranty, Club Car must prove that:

1. Martin Murphy executed the guaranty agreement; and

2. CCQ failed to pay the amount demanded by Club Car.

If you should then find that CCQ is indebted to Club Car such that Club Car is entitled to recover damages from CCQ, then Martin Murphy and CCQ would be jointly and severally liable to Club Car.

Jury Instr. at 11. The instructions given are a reflection of Georgia law expressed in Rodgers v. First Union Nat. Bank of Ga., 220 Ga. App. 821, 821, 470 S.E.2d 246, 247 (1996).

While the Court did not instruct the jury on whether the personal guaranty remained in effect after 1991, Murphy also did not request such a jury charge.[9]" [E]ach party is responsible for requesting whatever jury instructions it may deem appropriate, and failure to so request, or to object to an instruction deemed inappropriate, precludes assigning as error the giving or the failure to give an instruction." McElroy v. Firestone Tire & Rubber Co., 894 F.2d 1504, 1510 n.10 (11th Cir. 1990) ; Ad-Vantage Tel. Directory

Consultants v. GTE Directories Corp., 849 F.2d 1336, 1349 (11th Cir. 1987) ("[A] litigant is entitled to have the jury instructed on its theory of the case, if there is any competent evidence to support the theory, and if the instruction is properly requested."); 9 Moore' s Federal Practice § 51.11 [l] [a] .

Whether or not Murphy asserted the issue of the continued enforceability of the guaranty at trial, he made no request that the jury be charged on the theory that the guaranty was not enforceable after 1991. Under the rule in the Eleventh Circuit, he cannot now obtain a new trial on the Court's failure to issue a jury charge that he did not request. Accordingly, Murphy's motions must fail on this ground.

D. Validity of the Personal Guaranty

Murphy next contends that a merger clause in a 1992 distributorship agreement executed by CCQ and Club Car forecloses the enforceability of the personal guaranty he executed in 1991. Murphy further contends that he understood the personal guaranty to be enforceable for only one year. Murphy' s latter contention is contradicted by the language of the guaranty itself, which provides that "this Guaranty is made and shall continue as to the Obligations incurred or arising prior to actual receipt by Club Car, Inc. of written notice of the termination hereof from the Guarantor." Ex. 4. Murphy's contention that he believed the guaranty would expire after one year is, at best, parol evidence contradicted by the unambiguous terms of the guaranty.

"Where contract language is unambiguous, no

construction is necessary and the Court must simply enforce the contract according to its clear terms." Caswell v. Anderson, 241 Ga. App. 703, 703, 527 S.E.2d 582, 582 (2000). Parol evidence cannot serve to change the unambiguous terms of a contract. O.C.G.A. § 13-2-2(l). The language in Murphy's personal guaranty addressing the continued enforceability of the guaranty until written notice of termination by Murphy is unambiguous, and Murphy's contentions regarding his understanding of the guaranty are foreclosed by the parole evidence rule.

Likewise, Murphy's contention that a merger clause in the 1992 distributorship agreement between CCQ and Club Car invalidated the guaranty, which was executed in 1991, lacks merit. Murphy was not a party to, nor was he bound by, the distributorship agreement in his personal capacity, and the enforceability of the guaranty cannot be affected by a separate contract to which Murphy was not a party. Accordingly, Murphy may not obtain relief on these grounds.

E. Duration of the Personal Guaranty

Murphy also contends that the guaranty is unenforceable because it was indefinite in duration. The guaranty, by its own terms, runs "as to the Obligations incurred or arising prior to actual receipt by Club Car, Inc. of written notice of the termination hereof from the Guarantor." According to this language, the guaranty is not of indefinite duration but runs until written notice of termination from Murphy. Georgia courts have found similar personal guaranties with similar durational limitations to be enforceable. Builders Dev. Corp. v. Hughes Supply, Inc. , 242 Ga. App. 244, 245,

529 S.E.2d 388, 389 (2000); Schroeder v. Hunter Douglas, Inc., 172 Ga. App. 897, 898, 324 S.E.2d 746, 748 (1984); Blalock v. Central Bank of Geor. 170 Ga. App. 140, 140, 316 S.E. 2d 474, 475 (1984) . Accordingly, the Court finds the jury determination that the personal guaranty is enforceable to be supported by legal authority. [10]

F. Evidence, of Murphy's Finances

Murphy next argues that the Court's determination that Club Car could present evidence regarding Murphy's personal financial activity was in error and unduly prejudicial. Murphy's counsel, however, did not object at trial when the evidence regarding his financial activity was elicited. Trial Tr., vol. I, at 111-17. The Court further finds evidence of transfers by Murphy of money from CCQ into a separate corporation to be relevant to Murphy's motive and intent in his relationship with Club Car under the distributorship agreements. The evidence also could show that Murphy intentionally has avoided his obligations under the distributorship agreement, which would entitle Club Car to recover expenses of litigation under O.C.G.A. § 13-6-11. Because Murphy's counsel did not object to the evidence at trial, and because the evidence was relevant to claims pursued by Club Car, Murphy may not obtain relief on this ground.

G. Personal Jurisdiction

Murphy next challenges the Court's exercise of personal jurisdiction in this case. While Murphy has done business in Georgia in his capacity as a corporate officer of CCQ, he contends that he does not have

sufficient personal contacts with the state to warrant personal jurisdiction. Murphy has raised this issue previously, and the Court has addressed his contentions in four prior orders. For the sake of clarity, however, the Court will address again its bases for exercise of personal jurisdiction.

Georgia courts recognize a sharp distinction between the personal actions of a corporate officer and actions undertaken in their official capacity for purposes of determining whether a court may assert personal jurisdiction over that officer." As the court in Girard v. Weiss, 160 Ga. App. 295, 297-98, 287 S . E . 2d 301, 303 (1981), noted, an individual who does not have sufficient minimum contacts with Georgia under International Shoe v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 2d 95 (1945), and progeny is not subject to personal jurisdiction in Georgia for actions taken within the state solely in his or her capacity as a corporate officer. Further, in Harbin Enterprises Inc. v. Sysco Corporation,195 Ga. App. 694, 696, 395 S.E.2d 618, 620 (1990), the Georgia Court of Appeals specifically refused to hold that a corporate officer waived personal jurisdiction by signing a contract with a forum selection clause when he signed the contract in his capacity as an officer for the corporation.

The presence of a personal guaranty does not change that outcome. Southern Electronics Distributors, Inc., v. Anderson, 232 Ga. App. 648, 650. 502 S.E.2d 257, 260 (1998); see also, Apparel Resources International, Ltd. v. Amersig Southeast, Inc., 215 Ga. App. 483, 451 S.E.2d 113 (1994) (refusing to exercise personal jurisdiction over nonresident defendant whose only contacts with Georgia were her business dealings as

corporate officer and personal guaranty she signed) . Thus, in Georgia, the rule is that in order to assert personal jurisdiction over an individual whose dealings in the state have primarily been in his capacity as a corporate officer, the individual must have independent minimum contacts with the forum state that meet the due process standards established by International Shoe. But see Stephens v. Entre Computer Centers, Inc., 696 F. Supp. 636, 639 (N.D. Ga. 1988) (holding that forum selection clause is sufficient to establish personal jurisdiction over corporate officer).

In its prior order addressing Defendants' motion to dismiss, the Court found that Murphy possessed sufficient, independent minimum contacts with the State of Georgia in order to establish personal jurisdiction. Murphy perpetuated a business relationship with Club Car, which maintained its principal place of business and its manufacturing plant in Georgia, that lasted more than twenty years. Murphy negotiated contracts and agreements in Georgia, purchased products in Georgia, and maintained a distributorship relationship necessitating constant shipments from Georgia to Canada.

The Court finds this case analogous to White House, Inc., v. Winkler, 202 Ga. App. 603, 415 S.E.2d 185 (1992). In White House, the defendant, a California resident, was sued in his individual capacity for breach of an agreement to guaranty his incorporated business's debt. The defendant, as the principal officer of his corporation, contracted with the plaintiff to buy a large number of t--shirts and to execute a personal guaranty for payment. He failed to execute the guaranty and his corporation did not pay for the t-shirts. The Georgia

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Court of Appeals found that the trial court properly could exercise jurisdiction over the defendant even though he had never visited Georgia. Id. at 605. The court noted that the defendant, in the name of his bankrupt corporation, had done business with the Georgia plaintiff for several years, that the two businesses had an ongoing relationship, that his actions were purposeful, and that the defendant created continuing personal obligations between himself and the plaintiff. Id. The Court of Appeals concluded "that [the defendant] was far from being a passive party . . . but instead knowingly and 'purposefully did an act or acts and consummated a transaction or transactions within the state, so as to establish legally sufficient contacts.'" Id. (citing Georgia R. Bank Co. v. Barton, 169 Ga. App 821, 824, 315 S.E.2d 17 (1984)); see also Drennen v. First Home Savings Bank, 204 Ga. App. 714, 420 S.E.2d 376 (1992) (holding that Alabama defendant who made personal guaranty to secure loans for business deal was subject to personal jurisdiction in Georgia because he purposefully conducted business in Georgia); Autrey v. UAP AG/CHEM, Inc., 230 Ga. App. 767, 497 S.E.2d 402 (1998) (holding that Florida defendant, who was president and shareholder of corporation and who executed personal guaranty for delinquent debts of corporation, was subject to personal jurisdiction in Georgia).

Likewise, Murphy here acted in a purposeful fashion, created continuing personal obligations between himself and Club Car on behalf of CCQ, and was far from being a passive party in CCQ's business dealings with Club Car. Thus, the Court again finds that Martin Murphy is subject to personal jurisdiction under the Georgia long-arm statute and the Due Process Clause

of the United States Constitution.

H. Trial Schedule

Murphy next contends that the Court committed abuse of discretion in barring discovery and preservation of trial testimony, as well as scheduling the trial and all hearings to create the maximum inconvenience and prejudice to Martin Murphy. This includes but is not limited to scheduling trial before Martin Murphy . . . was medically cleared to stand trial.

Doc. 434 at 5.

The Court initially scheduled trial in this case for November 2002. On motion by Murphy, the Court continued the trial because of Murphy's health problems, which included complications from a stroke suffered in May 2002. Murphy underwent surgery on November 23, 2002. In a letter to the Court on October 29, 2002, Dr. Theodore Wein, Murphy's treating physician, indicated that "[a] normal recovery period from surgery of this magnitude would be three months before resuming normal activity. Therefore, I would advise that the trial be postponed at least until February, as originally requested." Doc. 434, Ex. 3. The Court continued the trial until February 10, 2003, slightly less than three months after Murphy's surgery and within the February time frame suggested by Dr. Wein.

While Murphy's counsel did request that the Court continue the trial until March 2003 in two letters to the Court written in January, in neither letter did Murphy's counsel inform the Court that Murphy's health status would preclude him from appearing at a

February 2003 trial date. In a January 2, 2003, letter, in fact, Murphy's counsel informed the Court that "[t]he early indications are that Mr. Murphy tolerated the surgery well and is doing much better. Mr. Murphy states that he is feeling better." Doc. 435. In a January 20, 2003, letter in which Murphy's counsel urged the Court to delay the start of trial until after March 26, 2003, because of prior commitments and vacations of counsel, Murphy's counsel added that "we have not heard from Mr. Murphy's doctors regarding his current health status." Id. Murphy made no formal objection to the February 10, 2003, trial date, either during the trial, the pre-trial conference, or at any time before the jury verdict. Murphy's counsel did request that the Court inform the jury of Murphy's medical problems i f an explanation of his condition was warranted during his testimony. Murphy testified competently during the trial, and the Court did inform the jury of his past medical problems.[12] The Court granted recess during Murphy's testimony so that he could regain his composure when he appeared to become emotional.[13]

Murphy's failure to object to the timing of the trial in this case ultimately defeats his motion for new trial on this ground. Even if an objection had been made, though, Murphy has failed to present evidence, either in the form of opinions from doctors or Murphy's trial testimony, that he was not medically competent to stand trial. Accordingly, his motions lack merit on this ground.

III. CCQ

CCQ also has filed motions for a new trial and for

judgment as a matter of law. As grounds for relief, CCQ asserts that Club Car owes CCQ Quebec Sales Tax ("QST") funds as a matter of law, that the jury was not properly instructed on Quebec law with regard to CCQ's claims against Champigny and EPC, that the Court erroneously excluded expert testimony regarding damages, that CCQ was not informed of the Court's charges prior to its closing argument, that CCQ should have been allowed to amend its pleadings after the Court declared Quebec law applicable in this case, that counsel for EPC and Champigny engaged in ex parte communications with the Court, that the Court made other enumerated errors in instructing the jury, that the Court failed to act on a motion to amend deposition designations, that Club Car was not entitled to attorney's fees and costs, that the Court erred in allowing Club Car to present evidence of Murphy's finances, that the Court erred in granting summary judgment to Club Car on CCQ's claims of fraud and RICO violations, that the Court "struck CCQ's claim for breach of the used car agreement and decided other issues that were not fully argued by the parties or properly before the Court for decision" in its summary judgment order, that Ingersoll-Rand Company Limited ("IRCL") was improperly dismissed from this case, that CCQ was prejudiced by the Court's scheduling order, and that the Court wrongfully denied CCQ the opportunity to take trial depositions of Russ Hooper and Lynda Capaddocia. The Court will address each contention in turn.

A. QST

CCQ seeks judgment as a matter of law on its claim for damages associated with QST funds allegedly owed by

Club Car. According to CCQ,

> [t]he jury verdict also, in part, awarded Club Car damages for its claims, including for QST which Club Car was not and is not authorized to collect on purchases in 2000, and which issue was intentionally misrepresented to the jury by Club Car counsel at trial." Doc. 435 at 2. CCQ asserts that Anita Murphy "was not allowed to say that Club Car was not authorized to collect the QST it collected from CCQ from 1998-2000, despite her personal knowledge." Doc. 436 at 4.

CCQ sought judgment as a matter of law at trial on the matter of Club Car's claim for attorney's fees and expenses. Trial Tr., vol II, at 313. No other issues were raised by CCQ in a Rule 5 0 motion before the jury was charged and retired to deliberate. According to Rule 50, a party may not seek judgment as a matter of law on an issue that was not raised in a Rule 50(a) motion at trial. Fed. R. Civ. P. 50(b); Redd v. Phenix City, 934 F.2d 1211, 1214 (11th Cir. 1991). While CCQ may seek relief in a Rule 59 motion for new trial on the QST issue and any other issue not raised during trial in its Rule 50(a) motion, it may not obtain relief under Rule 50(b).

The Court does not find testimony or other evidence in the record to support CCQ's contention that Club Car was not due the full amount of the jury verdict upon a finding that CCQ had breached the distributorship agreement. Regarding Anita Murphy's testimony concerning the QST funds, her knowledge of Club Car's authority to collect QST funds was not based on personal knowledge but on hearsay evidence. At trial she testified that " [i] t was determined that all the invoices that I had claimed from Club Car, Inc. were

not valid because Club Car, Inc. was not registered with the provincial government." Trial Tr., vol. III, at 202.[14] The Court properly excluded her testimony under the hearsay rule. Fed. R. Evid. 802.

Without Anita Murphy's testimony, the Court perceives, and CCQ cites, no evidence or testimony in the record indicating that Club Car was not entitled to recover the full amount of the jury award." Accordingly, CCQ is not entitled to a new trial on this ground.

B. Jury Instructions on Quebec, Law

CCQ next asserts that the jury was not properly instructed on Quebec law. According to CCQ, "[t]hough Quebec law supposedly applied to the claims against Champigny, the jury was given Georgia law instructions on the conspiracy claims against Champigny that were erroneous, precluded liability by Champigny, and prejudiced the jury against CCQ." Doc. 435 at 3.

As the Court has illustrated, however, the instructions issued by the Court to the jury regarding CCQ's tort claims against EPC and Champigny, to which Quebec law applied, were almost identical to the jury charges requested by CCQ. See supra, Section II. B . Thus, if the Court's instructions bore a closer resemblance to Georgia law than Quebec law, EPC and Champigny alone would have reason to complain. In reality, as the Court stated supra, from the requested jury charges submitted by both EPC and CCQ it does not appear that tort liability standards in the Province of Quebec vary significantly from those in Georgia.

To the extent that the Court's jury instructions differ from those submitted by CCQ, a trial judge is allowed "wide discretion over the style and wording employed as long as the [jury] instructions accurately reflect the law." Schafer v. Time, Inc., 142 F.3d 1361, 1368 (11th Cir. 1998). So long as "the jury charges, considered as a whole, sufficiently instructed the jury so that jurors understood the issues and were not misled," a new trial is not warranted. Id.

The charges on Quebec law in this case, however, closely resembled those submitted by CCQ. In such a case, CCQ cannot complain of error. Beard v. Mitchell, 604 F.2d 485, 493 n.8 (7th Cir. 1979) (finding no error where plaintiff claimed that judge improperly advised him of instructions, where "most of plaintiff's instructions were given in substance"). Accordingly, CCQ is not entitled to relief on this ground.

C. Exert Testimony

CCQ asserts that " [t]he Court failed to follow clear and controlling Eleventh Circuit authority when it excluded evidence and testimony offered by CCQ' s damages expert based on issues that go solely to the credibility of the testimony, and which affected only a portion of the excluded testimony." Doc. 435 at 4. CCQ refers apparently to the Court's exclusion of the expert testimony of Peter Ryan.

At trial, the Court allowed Ryan to testify over objections to his qualifications" on the issue of damages incurred by CCQ. Ryan divided CCQ's damages into eight categories representing past and future lose profits and lost sales from 1997 to 2000 and from 2001 to

2005. Trial Tr., vol. IV, at 32. He testified that CCQ had suffered damages in theform of lost profits amounting to $10,464,000 (Can.). Id. At 89. On cross--examination, Ryan conceded that he used gross sales numbers to calculate future damages without accounting for incremental expenses incurred in generating sales, or any expenses other than costs of good sold. Id. at 94. He also conceded that his damage figures had not been discounted to present value and that he had not subtracted revenue generated by CCQ, and revenue that would have been generated by CCQ, irrespective of any deleterious actions taken by EPC, Champigny, or Club Car. Id. at 96-97.

At the close of Ryan's testimony, counsel for EPC and Champigny objected again to the expert testimony on the ground that the testimony failed to meet the strictures of reliability for expert testimony set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Court, after hearing arguments on the motion outside the presence of the jury, granted the motion to exclude aspects of Ryan's testimony where he calculated lost profit without including expenses. Immediately after the jury returned, and just prior to closing arguments, the Court instructed the jury,

Members of the jury, with respect to Mr. Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved and merely used the gross amount, his opinion as to the loss on the Defendant's counterclaim is stricken. You are not to consider that.

Trial Tr., vol. IV, at 222.

In calculating lost profits, "the gross amount minus expenses equals the amount of recovery." Shaw v. Rui z , 207 Ga . App. 299, 304, 428 S.E.2d 98, 99 (1993).[17] In seeking lost profits, a party must "show the probable gain with great specificity as well as expenses incurred in realizing such profits." Id. Ryan's final damage figure of $10,464,000 (Can.), and the damage totals combined to reach that figure, were biased by his failure to include incremental costs incurred in generating revenue, as well as his failure to discount the figures to present value.

Under Federal Rule of Evidence 702, a court is required to exclude expert testimony that is unreliable and unhelpful to a jury, as such testimony "by its very nature has the potential to be both powerful and misleading. "K.W. Plastics v. United States Can Co., 131 F. Supp. 2d 1289, 1291 n. l (M.D. Ga. 2001). Under Daubert, the Court is charged with a "gatekeeping" function, under which the Court is required to screen expert testimony before allowing such evidence to be presented to a jury for deliberation, to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 509 U.S. at 589 ("Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

The objective . . . is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that

characterizes the practice of an expert in the relevant field.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999). The Court must render an assessment "of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts in issue." Daubert, 509 U.S. at 592. Daubert's "gatekeeping" requirement is applicable to expert testimony concerning calculation of lost profits. Kumho Tire, 526 U.S. at 147.

In this case, the Court considered Ryan's testimony and concluded that it did not comport with the requirements of Georgia common law for calculation of lost profits, nor did it comply with rudimentary accounting standards. Evidence of gross profits submitted to the jury without the inclusion of incremental expenses, the exclusion of CCQ's profits gained independent of Club Car, Champigny, or EPC, or an adjustment to account for inflation could serve only to confuse the jury unnecessarily. Outside a courtroom, in an accounting office, one would not expect Ryan to calculate profits for, say, CCQ's tax returns in such a manner, reporting only profits from sales without including overhead and expenses. Daubert requires those same professional standards to be applied by an expert testifying as to lost profits in a courtroom. Ryan's testimony failed the standards set forth in Daubert and Kumho Tire.[18]

Accordingly, the Court instructed the jury to ignore any damages calculations that did not include expenses.

The Court, however, did not instruct the jury to ignore all of his testimony. Any testimony elicited from Ryan not concerning lost profits, where expenses were not deducted, was submitted to the jury. 19 Furthermore, testimony from Murphy and his wife, Anita Murphy, concerning CCQ's financial losses was still in the record for the jury to consider. Courts have recognized that, even where the exclusion of evidence related to damages was error, the error is harmless where sufficient evidence exists on the record for the jury to render a verdict. E. ., Iervolino v. Delta Air Lines, Inc., 796 F. 2d 1408, 1420-21 (11th Cir. 1986); C.A. May Marine Su l Co. v. Brunswick Core, 649 F.2d 1049, 1054 n.6 (5th Cir. 1981); Hall v. Texas & New Orleans Ry. Co., 307 F. 2d 875, 877 (5th Cir. 1962) ; Martin v. Handy-Andy Community Stores of Texas, 214 F.2d 10, 12 (5th Cir. 1954). Thus, even if the Court had erred in excluding certain parts of Ryan's testimony, testimony concerning damages remained on the record for the jury to consider and CCQ was not prejudiced by the error to the extent that a new trial would be warranted. 20 See Fed. R. Evid. 103 (a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."); Fed. R. Civ. P. 61 ("No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice.").

CCQ also argues that the Court "failed to follow the procedure laid out in Daubert. There was no hearing on the expert's methodology or opposing expert testimony offered." Doc. 436 at 7. In Kumho Tire, however, the

Court recognized that [t]he trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable.

Kumho Tire, 526 U.S. at 152. The Court's authority and responsibility under Daubert may be exercised "when asked to rule on a motion in limine, on an objection during trial, or on a post-trial motion," provided that the Court has sufficient evidence to evaluate the expert testimony. Goebel v. Denver & Rio Grande Western R. R., 215 F. 3d 1083, 1087 (10th Cir. 2000).

In this case, the Court allowed each party to question Ryan on voir dire concerning his qualifications. Trial Tr., vol. Iv, at 17-21. Ryan then was subject to extensive direct, cross, and re-direct examination, at which time testimony was solicited concerning Ryan's methods of calculating CCQ's past and projected damages. Id. at 21-113. While a Daubert hearing i s not required where the record before the Court i s sufficient for the Court to make a determination, 2 the Court nevertheless heard oral argument outside the presence of the jury after Ryan had delivered his testimony. Id. at 212-222. At that time, the Court heard argument from each party concerning the reliability and accuracy of Ryan's testimony, and whether that testimony would aid the jury in deciding the issues before it.

The Court determined from the evidence before it that Ryan's procedures for calculating CCQ's past and projected future profit margins were insufficient

according to rudimentary accounting standards, and that his testimony regarding such margins would only serve to confuse the jury. The Court did not need the aid of an opposing expert to recognize the deceptive nature of Ryan's methodology and its lack of conformity with generally accepted accounting principles. Indeed, as the Court expressed at trial, it is a matter of "common sense" that a party's profit margin will be affected by such things as incremental costs and that a party's damages should be reduced by revenue it would generate regardless of an opposing party's fault and adjusted for inflation. If Ryan were testifying as an ordinary, non-expert witness, perhaps an instruction to the jury concerning his testimony would be unnecessary. Because of his status as an expert witness, and the weight that such status may carry within the confines of a jury room, the Court determined that an instruction concerning Ryan's testimony was appropriate.

Because Ryan's expert testimony was misleading and departed from traditional norms of calculation of damages, the Court properly excluded aspects of his testimony that departed from those norms. The Court finds no error either in its ruling or in its procedure in arriving at the ruling. CCQ may not obtain relief on this ground.

D. Timing of Charge Conference

CCQ next raises a contention identical to one raised by Murphy, that CCQ's counsel did not have access to a written copy of the jury charges prior to closing arguments. The Court addressed this contention in Section II.B, supra, of this Order. For the reasons

expounded in that Section, the Court finds that CCQ did not object to, and was not otherwise prejudiced by, the Court' s failure to distribute written copies of the jury charges prior to closing arguments.

E. Motion to Amend Pleadings

CCQ contends that because the Court granted EPC's motion to apply Quebec law to CCQ' s tort claims against it, CCQ should be allowed to amend its complaint to add additional claims. CCQ takes the position that the Court "changed" the law applicable to the case in the week prior to trial, and that it should be allowed to supplement its contentions as a result.

CCQ filed three lengthy counterclaim complaints in this case, each filled with a myriad of claims ranging from alleged violations of Racketeer Influenced Corrupt Organizations ("RICO") laws to common law claims of slander. Many of those claims were dismissed in summary judgment motions filed by Club Car, Murphy, Champigny, and IRCL, a former defendant in this case. Despite acknowledging in its response to Club Car's summary judgment motion that it did not intend to pursue each and every counterclaim it had levied, CCQ MSJ Resp. Brief at 12, CCQ waited until the week before trial to inform its adversaries of the claims it would pursue at trial. In the pretrial conference, CCQ stipulated that it would limit its claims at trial to those specified in its motion to amend the pretrial order. Doc. 337. On the first day of trial, CCQ filed a second motion to amend the pretrial order, raising claims not included in its prior motion. The Court issued an order stating that

with regard to CCQ's motion to amend its pretrial order, it appears that CCQ seeks to include independent claims for defamation and violation of a duty of good faith against EPC and Pierre Champigny. CCQ has been allowed ample time to streamline its case and to clarify the bases of its claims for relief. The Court will not allow CCQ to slip claims for relief back into the case at this time. The claims presented by CCQ in its first motion to amend its pretrial order on February 3, 2003, which was granted by the Court, are the claims available for submission to the jury in this case.

Doc. 403 at 2, 3. The Court addressed CCQ's complaint of unfair surprise by the application of Quebec law in the same order:

While the Court concurs with the sentiment that the timing of EPC's motion has complicated preparation for trial, CCQ cannot claim unfair surprise. Both CCQ' s factual allegations against EPC and the rule of lex loci delecti[22] have existed since CCQ filed its consolidated counterclaim complaint in this case. EPC moved the Court for a determination of law, not for the introduction of any novel factual allegation or theory of relief. CCQ should have been aware since it filed its counterclaim complaint that the application of Quebec law is proper. It cannot complain now of unfair surprise resulting from its own counterclaim charges.

Id. at 3.

CCQ stipulated to the claims it would raise at trial in the pretrial hearing. The Court's decision to apply Quebec law was not a "change" to the law applicable in

this case, but a clarification of the locus of the legal standards to be applied under Georgia's lex loci delecti rule. CCQ cannot claim to be surprised by the Court's ruling, as the facts necessitating the ruling, those indicating the locus of CCQ's alleged injury, have been known for months and were a part of CCQ's own counterclaim complaint. The Court properly held CCQ to its pretrial stipulation and refused to add last-minute claims to this action, and CCQ is not entitled to a new trial on this ground.

F. Ex Parte Communications

CCQ next contends that counsel for EPC and Champigny engaged in improper ex parte communications with the Court. Specifically, CCQ claims that counsel for EPC and Champigny distributed to the Court a copy of a page from a damages handbook relevant to the admissibility of Ryan's expert testimony on damages, that the copy was not entered as an exhibit, and that no copy was distributed to CCQ's counsel. CCQ further contends that the Court's exclusion of Ryan's testimony was based on the alleged ex parte communication.

At the close of evidence, as counsel for EPC and Champigny, Jim Purcell, was bringing a motion under Daubert, the following exchange occurred between Purcell and CCQ's counsel, Jeff Harris:

MR. PURCELL: Your Honor, it's right there in the page that I gave the Court earlier on the consideration of testimony, on page 281 of the reference guide of damages in the reference manual on scientific evidence. It's got a section on economic damages and what's in

and what's out and how you compute those damages. And it's exactly how he didn't. And the jury doesn't need to be dealing with $10 million today.
MR. HARRIS: I'm not sure what --
MR. PURCELL: And it's sheer orchestrating and lawyer arguments about how it is or isn't the legitimate standard.
MR. HARRIS: I'm not sure what submission to the Court he's referring to.
MR. PURCELL: The one I put back there on your desk.
MR. HARRIS: This was submitted, apparently, before, and I never -- I wasn't aware of that Trial Tr., vol. IV, at 216-17. After a recess, counsel for each party met at sidebar, with Darren Penn speaking as counsel for CCQ
MR. PENN: If I may say something? This is the first time we have seen this document, and I want to let you know and put it on the record that this was misrepresented by Mr. Purcell. It does not say what he says it did. It's from a reference guide.
THE COURT: I cannot help that. I have not read i t. Trial Tr., vol. IV, at 222 (emphasis added).

From the transcript it appears that counsel for EPC and Champigny attempted to bring to the Court's attention a copied page from a damages handbook, and that he placed a copy of the page on the desk of CCQ's counsel. More importantly, though, the Court never looked at or considered the document. Because the record indicates that the Court did not consider material submitted ex party in this case, CCQ is not entitled to relief on the issue.

G. Jury Instructions

CCQ enumerates in a conclusory fashion a number of other asserted errors in the Court's instructions to the jury. The Court will consider each contention in turn.

CCQ first asserts that"[t1he Court failed to properly instruct the jury on the issue of distributor pricing in CCQ' s beach of contract claims." Doc. 435 at 5. CCQ does not delineate which of its proposed jury charges on "distributor pricing" the Court did not include, and the Court has found no proposed charges dealing with "distributor pricing." "[E]ach party is responsible for requesting whatever jury instructions it may deem appropriate, and failure to so request, or to object to an instruction deemed inappropriate, precludes assigning as error the giving or the failure to give an instruction." McElroy v. Firestone Tire & Rubber Co., 894 F.2d 1504, 1510 n.10 (11th Cir. 1990) ; Ad-Vantage Tel. Directory Consultants v. GTE Directories Corp. , 849 F. 2d 1336, 1349 (11th Cir. 1987) ("[A] litigant is entitled to have the jury instructed on its theory of the case, if there is any competent evidence to support the theory, and if the instruction is properly requested."). Furthermore, CCQ fails to illustrate any manner in which it was prejudiced by the asserted error in the jury instruction. CCQ next asserts that "[t]he Court instructed the jury that it could not find in favor of CCQ on either conspiracy or punitive damages claims unless all of the conduct related to those claims occurred in the State of Georgia." Doc. 435 at 5. The Court delivered the following instructions to the jury:

Punitive damages must relate to the state in which the illicit activity occurred because such damages are based on a state's interest in protecting its own consumers and its own economy. This means that your punitive

damage award cannot be based on any conduct of EPC or Club Car that occurred outside of Georgia. You must find that EPC and Club Car committed conspiratorial acts in the state of Georgia to find in favor of CCQ on its punitive damage claim. If you find that some or all of EPC's or Club Car's conspiratorial acts occurred outside of Georgia, you may not award punitive damages to CCQ based on those activities.

Jury Inst. at 27-28. The court's charge is an accurate reflection of the principle that one state may not punish conduct occurring in a neighboring state, or in this case a neighboring country. See BMW v. Gore, 517 U.S. 559, 571-74 (1996) ("[A] state may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."). Accordingly, the charge was an appropriate and accurate reflection of existing law.

CCQ next contends that " [t] he Court failed to instruct the jury concerning the tortious interference claim against Champigny." Doc. 435 at 5. The Court, however, did instruct the jury extensively on CCQ's tortious interference claims against EPC and Champigny. Jury Inst. at 15-19. Thus, CCQ's contention is contradicted by the record.

Finally, CCQ contends that " [t]he Court failed to properly instruct the jury on bad faith in business negotiations and defamation under Quebec law." Those claims, however, were not listed in CCQ's amended pretrial order and the Court denied CCQ's motion to amend its pretrial order after the initiation of trial. Accordingly, CCQ may not obtain relief on this ground.

So long as "the jury charges, considered as a whole, sufficiently instructed the jury so that jurors understood the issues and were not misled," a new trial is not warranted. Schafer v. Time, Inc., 142 F.3d 1361, 1368 (11th Cir. 1998).

CCQ has not illustrated that the Court erred in its instructions to the jury, nor has it shown prejudice from any asserted error, and it may not obtain a new trial on these grounds.

H. Motion to Amend Deposition Designations

CCQ next contends that the Court's failure to rule on its "motion to amend deposition designations" entitles it to a new trial. In its motion, which was filed on the first day of trial contemporaneously with three other motions, CCQ "move[d] the Court to reconsider objections to deposition designations related to CCQ' s claims against Champigny under the applicable Quebec law." Doc. 388 at 4. In substance, CCQ's motion constituted a restatement of its objection to the Court's ruling on the applicability of Quebec law to this case. See id. at 1-3.

Contrary to CCQ's assertions, the Court denied the motion in its order of February 11, 2003. Doc. 403 at 2. Because the Court did rule on the motion, and because CCQ's assertions concerning the applicability of Quebec law, as the Court has already ruled, are without merit, CCQ may not obtain a new trial on this ground.

I. Attorneys' Fees and Costs

CCQ next contends that Club Car is not entitled to

attorneys' fees and costs in this litigation. While the jury did not award Club Car attorneys' fees and costs in its verdict, the Court determined that Club Car was entitled to such under the distributorship agreement after it had filed a Rule 50(b) motion for judgment as a matter of law.

Under paragraph 20 of the distributorship agreement between Club Car and CCQ, which was admitted into evidence at trial as Plaintiff's Exhibit 1,

In any action or proceeding commenced by or against Club Car relating to or arising out of this Agreement, whether such action or proceeding be founded upon contract, tort, statute, regulation or otherwise, Club Car shall be entitled to recover from Distributor its costs and expenses (including but not limited to reasonable attorney's fees) of prosecuting and/or defending any such action or proceeding in which Club Car has substantially prevailed. For purposes of this Agreement, Club Car shall be considered to have "substantially prevailed" in such action or proceeding if its net recovery therein exceeds that of the Distributor in the same action or proceeding . . . .

The jury in this case awarded Club Car $1,457,360 more than it awarded CCQ, the "Distributor" under the contract. Accordingly, under the terms of the contract, which were not disputed at trial,[23] Club Car was entitled to attorneys' fees and costs. Because the construction of a contract is a question of law, Magnetic Resonance Plus, Inc. v. Imaging Systems Int'1, 273 Ga. 525, 526, 543 S.E.2d 32, 34 (2001), and because the terms of paragraph 2 0 appear unambiguous, the Court found that, notwithstanding the jury verdict, Club Car was

entitled under the distributorship agreement to recovery of attorneys' fees and costs against CCQ. Doc. 445 at 2.

CCQ is unable to offer evidence contradicting the clear language of the distributorship agreement. Accordingly, the Court will sustain its prior order awarding attorneys' fees and costs to Club Car in its claim against CCQ.

J. Murphy's Finances

CCQ next contends that the Court erred in allowing Club Car to present evidence concerning Murphy's financial activity. The Court ruled in Section II.F of this Order that Murphy's financial activity was relevant to this action and thus admissible. For the reasons set forth in that Section, supra, CCQ may not obtain relief on this ground.

K. Fraud and RICO Claims

CCQ claims that the Court errantly dismissed CCQ's fraud and RICO claims in its summary judgment order of January 17, 2003. CCQ makes this assertion in a conclusory fashion, Doc. 435 at 7, and makes no argument, points to no newly discovered fact, and cites no caselaw supporting its position. For the reasons stated in the Court's order of January 17, 2003, Doc. 326, CCQ's claims of fraud and its claims under RICO fail to state a claim on which relief may be granted, and the Court will not allow CCQ a new trial on this ground.

L. Other Claims Addressed in the Court's January 17, 2003, Order CCQ next asserts that "the Court

effectively granted summary judgment on CCQ's claims of conversion, money had and received, and breach of the used car agreement-though [Club Car] had not even moved for judgment on these issues." Doc. 435 at 7. While CCQ is correct in that Club Car did not raise the issues of conversion, money had and received, and breach of contract in its summary judgment motion, those issues were properly before the Court because CCQ had moved for summary judgment on those issues. Doc. 326 at 40. The Court found that "CCQ does not assert that it demanded the return of the QST funds, . . . a disputed issue of material fact exists as to who is in possession of the funds, and . . . money is generally not a proper subject of conversion actions," d. at 42--43; "a disputed issue of material fact exists as to whether [Club Car] has been enriched unjustly through CCQ' s submission of QST payments [on the claim of money had and received] , " Id, at 41; and that CCQ' s summary judgment motion on the used cart agreement could not succeed because the agreement was indefinite in duration, failed to satisfy the statute of 61 frauds, and, even if enforceable, could be terminated at any time by either party. Id. at 43-44.

The Court made the determinations necessary to rule on CCQ's motion for summary judgment. If the language in the Court's order proved dispositive on the issues raised by CCQ, then CCQ has no one to blame but itself. CCQ' s motion for new trial cannot succeed on this ground.

M. IRCL

CCQ further asserts that the Court erred when it dismissed IRCL from this action in its order of January

17, 2003. Specifically, CCQ contends that [p]rior to trial the Court dismissed Ingersoll Rand f rom the action, though questions of fact remained as to Club Car's commission of fraud, conversion, money had and received, theft by deception, and resulting violations of the Georgia RICO statute, and as to whether Club Car's parent company [IRCLI received funds from any of Club Car's illicit activities as prescribed under the Georgia RICO Act.

Doc. 435 at 7. The Court granted IRCL's motion for summary judgment and dismissed it from the case because CCQ's claims for fraud and RICO violations lacked merit and because IRCL was not yet in existence during the time periods that CCQ alleges illicit activity occurred. Doc. 326 at 30. CCQ cites no newly discovered facts or rule of law that would change the outcome of IRCL' s motion for summary judgment. Accordingly, CCQ may not obtain a new trial on this ground.

N. Scheduling Order

CCQ asserts that the Court "issued its scheduling orders to impede CCQ's conduct of the litigation." Doc. 435 at 7. CCQ, however, had ample opportunity to conduct discovery prior to the close of discovery on September 1, 2002. As the Court held in Section II.H of this Order, the trial schedule in this case prejudiced neither Murphy nor CCQ. CCQ's conclusory assertion that the Court's scheduling order caused it to be prejudiced to the extent that it is entitled to a new trial lacks merit and cannot be successful.

O. Trial De ositions

Finally, CCQ asserts that the Court erred in excluding the trial depositons of Lynda Capaddocia and Russ Hooper. CCQ previously had taken the deposition of Hooper on two occasions, but Capaddocia had not been deposed and was not identified as a potential witness by CCQ. CCQ filed a motion approximately one month before trial seeking to depose Capaddocia and Hooper for purposes of trial. The Magistrate Judge denied the motion because CCQ failed to depose the witnesses prior to the close of discovery and because the Federal Rules of Civil Procedure do not distinguish between "trial depositions" and regular discovery depositions. Doc. 333; see Tatman v. Collings, 938 F.2d 509, 510-11 (4th Cir. 1991) (recognizing no distinction between trial and discovery depositions).

The Court finds that CCQ had ample opportunity to depose Capaddocia and re-depose Hooper prior to the close of discovery. Instead, CCQ waited until the proverbial eve of trial to seek the untimely depositions of the two witnesses. The Magistrate Judge properly denied CCQ the right to take the depositions, and CCQ may not obtain a new trial on this issue.

IV. CONCLUSION

The Court has carefully considered the positions of each party to this action. Although a "new trial may be granted even when substantial evidence supports the jury's verdict,"12 MOORE'S FED. PRACTICE § 59.05[5] (3rd ed. 1999), allowing the jury's verdict to stand here would not result in a miscarriage of justice. CCQ's motions for judgment as a matter of law under Rule 50 (b) and for a new trial under Rule 59 are DENIED. Likewise, Murphy's motions under Rule

50(b) and Rule 59 are DENIED.
SO ORDERED this day of May, 2003.

Footnotes

Fn1The jury awarded CCQ damages in the amount of $100,000 (Can.) on its counterclaim against Club Car, but the damages were offset against the $1,557,360 (Can.) Club Car recovered in its claim against CCQ.

Fn2Bentley held the position of national sales manager with Club Car from 1996 through 1998. Prior to 1996, he served within the company as credit manager and he now serves as director of "eastern direct zone sales."

Fn3CCQ contends that, while the right to receive commissions was terminated in the letter, the used cart agreement was not terminated insofar as CCQ retained a right of first refusal on all used golf carts sold in its territory. Club Car contends that the letter ended the arrangement in its totality.

Fn4 The carryall vehicle is distinct from the golf cart in that it is designed for industrial, rather than personal, use. CCQ contracted to sell Club Car's turf utility vechicles.

Fn5Club Car contends that the delay in submitting the application was the result of added responsibility placed on Speering, the resignation of her supervisor, and "a personal matter that Speering was experiencing at the time." P1. MSJ Brief at 9.

Fn6 On the damages side, Quebec law does not provide

for punitive damages, while Georgia law does. Because the jury did not find EPC or Champigny liable in tort, however, the issue of punitive damages is without import.

Fn7 For the most part, in filing his requests to charge under Quebec law, Murphy merely inserted the following sentences into the Georgia version of the requested charges he had filed previously:

Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in his duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral, or material in nature. Article 1457 Code Civil de Quebec (C.C.Q.).

Fn8 Because instruction on the principles of Quebec tort law was included in the Court's instructions on tortious interference with business relations, the Court did not repeat them in its instructions on tortious interference with a contract, which immediately followed.

Fn9Murphy's counsel, in fact, neglected to submit jury charge requests applicable to any of the claims levied against him by Club Car.

Fn10CCQ points to this Court's determination in a January 17, 2003, order that its claims under a used cart agreement lacked merit because the agreement was of

indeterminate length, and thus unenforceable. Unlike the personal guaranty, the used cart agreement, which was never memorialized in writing, had no provisions for its termination by either party. The Court also found the agreement unenforceable because, as an oral contract purporting to extend in duration for more than a year, it violated the statute of frauds. Furthermore, even if the agreement were enforceable, either party would have the prerogative to terminate it at any time, which is what Club Car did. Thus, the Court's ruling on the personal guaranty issue is not inconsistent with its ruling in the prior order regarding the used cart agreement.

Fn 11Georgia's long-arm statute is codified at o.C.G.A. § 9-10-91(1):

> A court of this state may exercise personal jurisdiction over any nonresident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

(1) Transacts any business within this state;
(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
(4) owns, uses, or possesses any real property situated within this state; or

(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

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(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(4) owns, uses, or possesses any real property situated within this state; or

(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

Fn12Murphy withstood cross examination from Club Car's counsel on February 10 and February 11, 2003. Trial Tr., vol. I, at 136-158, vol. II, at 1-13. He underwent direct and cross examination on February 12 and February 13. Id. vol III, at 177-186, 241-307, vol IV, at 1-12.

fn13Prior to granting Murphy a short recess to compose himself for further questioning, the Court instructed the jury that "Mr. Murphy has had some physical problems over the past year that may interfere, and probably is right now, with his testifying." Trial Tr., vol. IV, at 186. At the conclusion of the recess, the Court, upon request by Murphy's counsel, allowed Mr. Murphy to step down and his wife to take the stand for direct examination. Id.

Fn14Anita Murphy testified in deposition that the Quebec tax authority "told us that they were going to bill us $124,000 of QST that we had claimed because we had paid Club Car, Inc. . . . Club Car, Inc. was not mandated to collect the sales tax, they had no sales tax number, [and] over the past two years had not remitted any sales tax to the government of Quebec." Dep. of Anita Murphy 2, vol. 2, at 151.

fn15As the Court finds infra, the Magistrate Judge's denial of CCQ's motion to depose Lynda Capaddocia, a Quebec government official, likewise was not in error.

fn16 Counsel for EPC and Champigny objected to Ryan's testimony on the basis of his qualifications as an expert. Ryan testified that he was a close friend of Murphy, a business advisor to Murphy, qualified as a

chartered accountant in Quebec and worked as an accountant from 1966 to 1971, had never published a paper in the accounting field, had never done a study on economic damages before this case, and had never testified as an expert witness before this case. Trial Tr., vol. IV, at 17-20. The Court allowed counsel for each party to conduct a voir dire examination of Ryan in the presence of the jury on his qualifications to give expert testimony, and the Court heard arguments in a hearing outside the presence of the jury on the issue of Ryan's qualifications. The Court ultimately found him qualified to give expert testimony. Trial Tr., vol. IV, at 23-24.

fn17 In diversity actions, determination of damages is controlled by the law of the forum state. Complete Concepts, Ltd, v. General Handbag Corp., 880 F.2d 382, 389 (11th Cir. 1989).

fn18 CCQ contends that Ryan's testimony was excluded on the basis of his credibility. As the Court has noted, however, the record indicates that the Court allowed Ryan to testify after hearing evidence concerning his qualifications as an expert witness. The Court excluded evidence instead because Ryan's methodology was flawed. The method he used in calculating lost profits clearly did not comport with generally accepted accounting standards.

fn19 CCQ mistakenly asserts that "most of the damages excluded by the Court did incorporate cost factors." Doc. 436 at 3. According to the Court's instruction to the jury testimony concerning any such damages would not have been excluded. The Court only excluded "Mr. Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved

and merely used the gross amount." Trial Tr., vol. IV, at 222. The Court did not exclude the totality of Ryan's testimony. Thus, any testimony elicited from Ryan that took costs into account, by the terms of the Court's instruction to the jury, was not excluded and the jury was free to consider such testimony in its deliberations. If CCQ is correct that most of the damage testimony elicited from Ryan "incorporated cost factors," then it would follow that most of the damage testimony was not excluded by the Court's instruction.

fn20 CCQ cannot show prejudice in any case in its claims against EPC and Champigny, as the jury found no liability in those claims and did not reach the issue of damages. A party cannot show prejudice from the exclusion of damages testimony where the jury never reaches the issue. Scheib v. Williams -McWilliams Co., 628 F. 2d 509, 510 (5th Cir.1980).

Fn21See Busch v. Dyno Nobel, Inc., 40 Fed. Appx. 947, 961 (6th Cir. 2002) (recognizing that court is "not required to hold a formal Daubert hearing").

Fn 22 Under the rule of lex loci delecti in the State of Georgia, the law applied in the locus of CCQ' s injuries, the Province of Quebec in this case, should be applicable to claims raised concerning those injuries. Doc. 403 at 2.

fn23 CCQ neither disputed the language or implications of paragraph 20 nor did it challenge the overall enforceability of the distributorship agreement. Instead, CCQ's position at trial was that an ambiguity existed in the "non-exclusivity" clause of the Agreement and that Club Car's actions rendered impossible CCQ's

performance of the contract. Even if CCQ's position had been that the Agreement was non-enforceable in its entirety, the jury verdict indicates that the jury found, as a factual matter, that an enforceable contract existed between Club Car and CCQ.

VERDICT

1. We, the jury, find in favor of the Plaintiff, Club Car, on its claim against the Defendant, Club Car Quebec ("CCQ"), in the amount of $1557360000

If you awarded damages to Club Car in item (1), proceed to item (2) . If you did not award damages to Club Car in item (1), proceed to item (3).

2. We, the jury, find in favor of the Plaintiff, Club Car, against the Defendant, CCQ, on its claim for attorneys' fees and costs associated with this litigation.
Yes No

If you awarded damages to Club Car in item (1) , proceed to items (3) and (4). If you did not award damages to Club Car in item (1), proceed to item (5).

3. We, the jury, find in favor of the Plaintiff, Club Car, against the Defendant, Martin Murphy, on its claim for damages under the surety agreement admitted as evidence in this trial.
Yes No

If you answered "yes" in item (3), proceed to item (4). If you answered "no" in item (3), proceed to item (5).

4. We, the jury, find in favor of the Plaintiff, Club Car, against the Defendant, Martin Murphy, on its

claim for attorneys' fees and costs associated with this litigation.

Yes No

5. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Club Car, on its counterclaim in the amount of *$100,000*

If you awarded damages to CCQ in item (5), proceed to items (6) and (7). I f you did not award damages to CCQ in item (5), proceed to item (8).

6. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Club Car, on its counterclaim for attorneys' fees and costs associated with this litigation.

Yes No

7. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Club Car, on its counterclaim for punitive damages.

Yes No

8. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Equipements Pierre Champigny (11EPC11), on its counterclaim in the amount of $ *0*

If you awarded damages in item (8), proceed to items (9) and (10). If you did not award damages in item (8), proceed to item (11).

9. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, EPC, on its counterclaim for attorneys' fees and costs associated with this litigation.

Yes No

10. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, EPC, on its counterclaim for punitive damages.

Yes No

11. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Pierre Champigny, on its counterclaim in the amount of $ 0

If you awarded damages in item (11), proceed to items (12) and (13). If you did not award damages in item (11), proceed to item (14).

12. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Pierre Champigny, on its counterclaim for attorneys' fees and costs associated with this litigation.
Yes No

13. We, the jury, find in favor of the Counterclaim Plaintiff, CCQ, against the Counterclaim Defendant, Pierre Champigny, on its counterclaim for punitive damages.

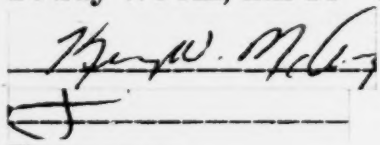
Yes No

14. (If you awarded damages in items (8) or (11),

proceed to the end of this verdict form. If you did not award damages in items (8) or (11) , then complete item (14) . Having found in favor of the Counterclaim Defendant, EPC, and the Counterclaim Defendant, Pierre Champigny, we, the jury, find that EPC and Pierre Champigny are entitled to recover attorneys' fees and costs associated with this litigation from CCQ.

Yes No

So Say We All, this 14th day of February, 2003.



Foreperson

CLUB CAR, INC., : Case No. CV100-195

:

Plaintiff, :

:

vs. :

:

CLUB CAR (QUEBEC) IMPORT INC. :

and MARTIN MURPHY, :

:

Defendants. :

:

********** :

:

CLUB CAR (QUEBEC) IMPORT, INC. :

:

Counterclaim Plaintiff, :

:

vs. :

:

CLUB CAR, INC.; PIERRE CHAMPIGNY; :

and EQUIPEMENTS PIERRE CHAMPIGNY, :

LTD., : Augusta, Georgia

: February 13, 2003

Counterclaim Defendants. :

:

_____:

VOLUME 4

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ANTHONY A. ALAIMO

United States District Judge and a Jury

Reported By: Norma Hatfield

Official Court Reporter

801 Gloucester Street, Rm. 216

Post Office Box 1316

Brunswick, Georgia 31521-1316

(912) 262-9989 FAX (912) 262-9100

normah@thebest.net

0012

01 Q And do you remember this language being in the website

02 back in the late '90s?

03 A I believe so, yes.

04 Q Now yesterday, Mr. Ellington asked you if you would

05 have bought all of the used cars if you had had the same

06 deal as Champigny, and you said, "You betcha."

07 My question to you is: Were you offered the same deal

08 as Mr. Champigny -- ever?

09 A That's the crux of the problem. I wasn't offered the

10 same deal.

11 MR. PENN: Thank you.

12 THE COURT: Anything else?

13 MR. ELLINGTON: Nothing else, Your Honor.

THE COURT: All right. You may stand down, Mr.

Murphy.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. HARRIS: Your Honor, we would call Peter Ryan.

MR. ELLINGTON: Your Honor, we have a matter that

should be taken up outside of the jury's presence with

respect to Mr. Ryan's testimony.

THE COURT: Did you know that Mr. Ryan was going

to be called?

MR. ELLINGTON: Not at 9:00 o'clock. We had Mr.

Murphy coming in first.

0013

01 THE COURT: Nevertheless, did you know he was

02 going to be called?

03 MR. ELLINGTON: We knew he was going to be called

04 this morning.

05 THE COURT: I wonder why you did not call my

06 attention to that before the jury came in.

07 MR. ELLINGTON: I apologize, Your Honor, but this

08 is a matter that should be taken up outside the jury's

09 presence.

10 THE COURT: Well, do you want to come up to

11 sidebar?

12 (At sidebar on the record)

13 MR. ELLINGTON: Your Honor, Mr. Ryan is going to

be testifying --

THE COURT: I cannot hear you.

MR. ELLINGTON: Your Honor, Mr. Ryan is going to

be testifying on behalf of CCQ against the counterclaim

co-defendants and offering scientific or expert testimony.

We believe the Court should examine its gatekeeper function

with respect to Mr. Ryan --

THE COURT: You should have called my attention to

it long before this.

MR. HARRIS: Absolutely, long before this.

(End of discussion at sidebar)

THE CLERK: Would you raise your right hand to be

0014

01 sworn?

02 PETER J. RYAN, DEFENDANT CCQ'S &

03 MARTIN MURPHY'S WITNESS, SWORN

04 THE CLERK: You can be seated.

05 Please state your full name, spell your last,

06 state your residence and occupation.

07 THE WITNESS: My name is Peter George Ryan,

08 R-Y-A-N. I live in Oakville, Ontario, in Canada.

09 DIRECT EXAMINATION

10 BY MR. PENN:

11 Q Good morning. You have traveled a very long way to be

12 here this morning.

13 A Yes, I have.

14 Q Where did you come from?

MR. PURCELL: Your Honor, I'm going object to

that. It doesn't matter where he's traveled from.

THE COURT: It really does not. We accommodated

you by waiting anyhow. But go ahead.

MR. PENN: I apologize, Your Honor.

BY MR. PENN:

Q If you could, please describe for us your educational

background?

A I received my preliminary education in Ontario. I

attended University of Windsor in Windsor, Ontario where, I

graduated with an Honours, Bachelor of Business.

0015

01 I then completed the Chartered Accountants program in

02 the Province of Quebec and was admitted to the Institute of

03 Chartered Accountants in Quebec and subsequently in the

04 Province of Ontario.

05 THE COURT: Would you give us the dates of these

06 things? When did you graduate?

07 THE WITNESS: I graduated in 1966. I was admitted

08 to the Quebec Institute of Chartered Accountants in 1970 and

09 to the Ontario Accountants in 1986.

10 MR. PENN:

11 Q And you mentioned Chartered Accountants. What does

12 Chartered Accountants mean?

13 A The Institute of Chartered Accountants in Canada would

14 be the equivalent of the certified public accountant in the

15 United States.

16 Q And can you just briefly go over with us a little bit

17 of your work history?

18 A I worked for a firm of chartered accountants in the

19 City of Montreal from 1966 to 1971. I was employed by the

20 Canadian Subsidiary, a private Swiss bank, from 1969 to

21 1973.

22 I traveled overseas in Europe and Australia from 1973

23 to 1976.

24 I returned to work for the Swiss bank on my return to

25 Montreal.

0016

01 I then worked for a company which was an importer and

02 manufacturer of sporting goods, primarily sporting goods.

03 And subsequent to that, I worked for a communications

04 and telemedia, a Canadian company.

05 And then, after moving to Toronto in 1986, I worked

06 with Mr. Paul Boffman managing his personal companies and

07 acquiring companies for him.

08 Q Do you have experience in evaluating businesses?

09 A Throughout my business career, I have been involved in

10 several acquisitions on behalf of the parties that I work

11 for. And part of that process would involve analytical work

12 in these evaluations.

THE COURT: Mr. Penn, did you file a CV in this case?

MR. PENN: We did, Your Honor.

THE COURT: You did?

MR. PENN: We did.

THE COURT: All right. Go ahead. I generally handle that aspect of it.

MR. PENN: Okay. I'm sorry. I didn't know that's the procedure.

THE COURT: You know what the rule is. You were notified of that in the pretrial discussion. But nevertheless, go ahead.

MR. PENN: All right. Thank you, sir.

0017

01 Just to clarify, is my understanding of that to

02 just proceed on and not cover all of his qualifications if

03 the CV has already been filed?

04 THE COURT: Let me see the CV.

05 MR. HARRIS: Your Honor, we filed it in Savannah.

06 THE COURT: You do not have a copy? Well, that is

07 all right. We will find one here.

08 MR. HARRIS: We do, Your Honor, but I don't think

09 we brought it.

10 THE COURT: Well, I will ask him some general

11 questions.

12 Mr. Ryan, you have described your work history

13 since you graduated; have you not?

14 THE WITNESS: Yes, Your Honor.

THE COURT: Have you published anything in your specialty?

THE WITNESS: No, Your Honor.

THE COURT: Have you appeared as a witness, an expert witness, in any case before?

THE WITNESS: No, Your Honor.

THE COURT: All right. Mr. Ellington, do you desire to voir dire him on his qualifications?

MR. PURCELL: I do, Your Honor.

THE COURT: All right. Go ahead, Mr. Purcell.

MR. PURCELL: Thank you, Your Honor.

0018

VOIR DIRE EXAMINATION

BY MR. PURCELL:

Q Mr. Ryan, you have not been working in the public accounting business, have you?

A As a public accountant?

Q Yes, sir.

A No.

Q You are Mr. Murphy's best friend, aren't you, sir?

A He is a personal friend, yes.

Q And, Mr. Ryan, you, in evaluating this case and the opinions you have reached --

THE COURT: Wait a minute. I just want to go into the qualifications. Do you wish to cross-examine him on that?

MR. PURCELL: I wish, Your Honor, to see what the

witness did before the jury hears scientific testimony and

expert testimony in this case.

MR. HARRIS: I object. They've had an opportunity

to Daubert this witness for six months. Why they chose to

do it now, I don't know.

MR. PURCELL: Your Honor, that's not

discretionary. The Court must exercise its gatekeeper

function before the jury.

MR. HARRIS: But --

MR. PURCELL: May I finish? -- before the jury

0019

hears scientific evidence. Accounting evidence is well-known scientific evidence. This is --

THE COURT: All I want to do is question his qualifications, if you can.

MR. PURCELL: Yes, sir.

BY MR. PURCELL:

Q So you have never testified as an expert, have you?

A No.

Q You have never been offered as someone who appraised damages in an economic loss case, have you?

A No.

Q You have never studied the area of economic damages and reported any cases of economic damages, have you?

A I'm not clear on the question.

Q You have never done a study of economic damages on a

16 business loss case and reported on that before, have you?

17 A Before this, no.

18 Q As a matter of fact, this is your very first experience

19 in such an exercise, isn't it?

20 A Yes.

21 Q And you have never, in your entire career, been engaged

22 in the business of public accounting, even though you are a

23 chartered accountant in Canada; isn't that right, sir?

24 A No.

25 Q Isn't it --

0020

01 A No, that's not right.

02 Q You, for the past twenty years, you haven't been a

03 public accountant, have you?

04 A I have not been full-time employed in the practice of

05 public accounting.

06 Q In fact, the financial statements, which are here, I

07 believe, in evidence, were not financial statements of this

08 business that you prepared, were they?

09 A I couldn't answer that without some time frames.

10 Q Mr. Ryan, the financial statements bear on their very

11 face that they were prepared by somebody else; you're not

12 disputing that?

13 A Some financial statements were prepared by other

people, yes.

MR. HARRIS: Your Honor, I would object if he's going to examine him about financial statements.

MR. PURCELL: I'm not --

MR. HARRIS: Financial statements are --

MR. PURCELL: I'm just going into his qualifications.

THE COURT: Go ahead.

MR. PURCELL: Thank you.

BY MR. PURCELL:

Q And the information you gained, Mr. Ryan, was supplied by Mr. Murphy, wasn't' it?

0021

01 A The information that I gained was from my examination

02 of the financial records of Club Car (Quebec) and the other

03 companies involved.

04 I had been involved as a financial professional all my

05 working career. And the fact that I was not in the practice

06 of public accounting doesn't --

07 Q Thank you very much, Mr. Ryan, but if you can restrict

08 your answers to the question that was asked, and we can move

09 a little faster.

10 Mr. Ryan, you were at business meetings as a business

11 advisor helping the Murphys, weren't you.

12 A Yes, sir.

13 Q That was your role. We heard the testimony, and I

14 won't belabor that by going through all the meetings.

15 MR. PURCELL: Excuse me.

16 (Pause)

17 MR. PURCELL: That's all I've got on the witness'

18 qualifications at this time, Your Honor.

19 THE COURT: Mr. Ellington?

20 MR. ELLINGTON: Nothing in addition to what Mr.

21 Purcell has done.

22 THE COURT: Do you submit that he is not qualified

23 to give an expert opinion in this case?

24 MR. ELLINGTON: Yes, Your Honor. That is our

25 position. He is not qualified as an expert for the reasons

0022

01 laid out.

02 MR. HARRIS: Your Honor, can I respond?

03 THE COURT: Of course,

04 MR. HARRIS: He is the -- has been the accountant

05 for this company. He has been the financial advisor to this

06 company. There's no one who knows this company better than

07 this man. And he's going to talk about --

08 THE COURT: You are doing a good bit of

09 testifying. I did not hear all of that from the witness.

10 The fact of the matter is he indicates that he has

11 never really studied the business of -- the subject upon

12 which you have put him up here for.

13 MR. HARRIS: Your Honor, we think we can lay the

14 foundation that he's --

15 THE COURT: That's one of the problems here when

16 you have multiple lawyers. Since he put the witness up, I

17 will have him state the objection, if he has any.

18 MR. PENN: Your Honor, we believe we can lay the

19 foundation for Mr. Ryan's qualifications. And we got cut

20 off right in the middle of the foundation questions.

21 THE COURT: He already said that he had no

22 experience in that particular field.

23 MR. PENN: Your Honor, he has testified that he

24 has twenty years experience as a financial accountant, and

25 he has been the accountant for CCQ for 20 years.

0023

01 THE COURT: Well, he specifically said he had no

02 experience in that field and had never testified before in

03 that field.

04 I am going to sustain the objection.

05 MR. PENN: Your Honor, I don't believe -- he's not

06 testifying in the field of just public accounting. He's

07 testifying in the field as a financial advisor, financial

08 analyst, as well as his specific experience as an accountant

09 for CCQ over the last twenty years.

10 THE WITNESS: Your Honor --

11 THE COURT: Just a minute.

12 MR. PENN: Your Honor, we would request that the

13 jury be excused so we can have a hearing on this.

14 THE COURT: All right. Members of the jury,

please go to the jury room.

(Jury out at 9:29 a.m.)

MR. PENN: May I continue, Your Honor?

THE COURT: Yes.

MR. PENN: This is an absolute ambush on the morning this witness arrives from Australia to testify in this case. He has been identified as an expert for well over a year and a half. He has been deposed at least twice. They never raised a Daubert motion before. This Court gave detailed lines for filing a motion in limine, and they have not filed it.

0048

number of other documents that he couldn't match with anything that were back ordered parts.

And in addition to that, Your Honor, if they have an objection to that number, that is a matter for cross examination for credibility not admissibility.

THE COURT: All right. Go ahead.

And, members of the jury, you are the exclusive judges of the credibility of the witness. And merely because an expert witness testifies to certain matters as his opinion, you are not bound by that opinion. You may disregard it or give it credit.

So go ahead.

MR. PENN: Thank you, Your Honor.

BY MR. PENN:

Q Again, what was the number of the second one?

A The damages on the parts packages, the amount was $921,435.

18 Q Let's go down to the third line. And that's damages on

19 lower margins on new and one year old cars sold.

20 How did you arrive at that calculation?

21 A Using 1997 as a base year, before the impact of one

22 year old cars in the marketplace, Mr. Murphy and Club Car

23 (Quebec)'s gross margin was twenty point -- I think the

24 precise number is five six percent.

25 By analyzing Club Car (Quebec)'s results for the

0049

01 subsequent three years, I determined that there had been a

02 significant reduction in the margin from 1997. And based on

03 Club Car (Quebec)'s sales volumes for those years, I

04 determined the dollar value attributable to that reduction

05 margin.

06 Q What was the dollar value?

07 A The dollar value in my report is $414,986.

08 Q Now the fourth item.

09 MR. ELLINGTON: Your Honor, I'm going to object to

10 the fourth item. That has been ruled on in this case thus

11 far. That was a matter that was ruled on by Your Honor in

12 the late fall and was addressed last week.

13 MR. PENN: Could we have a sidebar, Your Honor?

THE COURT: I guess so.

(At sidebar on the record)

MR. PENN: Your Honor ruled that these damages, as to Club Car's damages, are part of the tort claims, the interference with the business arrangement.

MR. HARRIS: That was your ruling at the hearing.

THE COURT: Just one of you.

MR. PENN: I'm sorry.

MR. ELLINGTON: He said as to Club Car. They're out as to Club Car. I'll second that.

MR. HARRIS: You didn't ask --

MR. PURCELL: Judge, they are out as to us, as

0055

01 Q Okay. And then the last item you have on this list is

02 the delivery of refused eighty-two cars that were not

03 delivered.

04 A Yes. And the amount is --

05 MR. ELLINGTON: Objection, Your Honor. This claim

06 is not part of the case at this point, and we object to the

07 inclusion of any damages on this issue.

08 THE COURT: Sustained.

09 BY MR. PENN:

10 Q Also as a part of your report, did you do an evaluation

11 of the value of Club Car (Quebec)?

12 A Yes, I did.

13 Q And how did you do that calculation?

14 A Based on --

MR. ELLINGTON: Your Honor, I'm going to object.

There's nothing in this report in the summary about the valuation of Club Car (Quebec).

MR. PENN: Your Honor, I refer you to page 4 of the report which states, "A revised sales volume would be $3,563,548," and based on this --

THE COURT: Wait a minute. You said page 4?

MR. PENN: Page 4.

THE COURT: What finding are you referring to?

MR. PENN: I'm referring to the middle paragraph at the top of the page, that sentence that begins, "A

0056

01 revised sales volume would be," and he provides a number.

02 "Based on this, the company would have had an estimated

03 market value of..."

04 MR. ELLINGTON: Your Honor, I'm going to object to

05 his testifying to that figure

06 THE COURT: That is what it says.

07 MR. ELLINGTON: But, Your Honor, it's not part of

08 the summary of conclusions and damages.

09 THE COURT: It is part of his report. I will

10 allow the question.

11 BY MR. PENN:

12 Q Mr. Ryan, how did you calculate the value of the

13 business?

14 A Based on an analysis I had prepared of the annual sales

volumes of new and used cars, and again, my opinion -- an

appropriate valuation technique, considering the synergies

that would be involved in similar businesses, I used a

factor of 75 percent of the average of the last three years'

sales.

Q Okay. You said -- you refer to an evaluation

technique. Are there other ways to value businesses?

A There are virtually hundreds of different techniques

for valuing businesses.

Q And have you, indeed, valued businesses with various

different techniques over the years?

0057

01 A I have been involved, over the course of my business

02 career, on both sides of negotiations for purchasing or

03 selling a business and determining, through negotiations,

04 appropriate value.

05 Q Why did you chose this particular technique to value

06 CCQ?

07 A It was the simplest and most straightforward and I

08 think the most appropriate way of evaluating the company.

09 Q Why do you think it's the most appropriate under the

10 circumstances?

11 A Where the potential acquirer was in a similar business

12 and where their records were not available to me, it was not

possible to calculate the economies and synergies that they would benefit from.

So it would appear appropriate that if you acquired this business, that it would be pure add-on gross margins, that any additional sales would generate profits which would drop straight to the bottom line.

And, therefore, this was an appropriate technique.

Q Okay. And you used a calculation of 75 percent of the average three year sales volume?

A Yes, sir.

Q What was the average sales volume for CCQ?

A That is --

Q What was the number?

0108

01 Q And are you familiar with Mr. Douglas Cates, who is the

02 expert that's been retained by both of the other parties in

03 this case?

04 A I have read his report, yes.

05 Q You have read his report. Are you also aware that he

06 gave a technique for valuing a business?

07 A I believe it was mentioned to me that he has suggested

08 that a multiple of cash flow is an appropriate valuation

09 technique.

10 Q Do you remember what his multiple was from his

11 testimony?

12 A Three to seven.

13 Q And based on your experience and your knowledge of CCQ,

what was the cash flow of the business on a yearly bias?

A Again, looking at the cash flow, if you were transferring the operation to a similar business where the amount of the incremental administrative expenses would be minimal, I would have assessed the cash flow based on a sales volume of new vehicles and an average selling price and average gross margin.

And I would have determined that to be somewhere in the vicinity of six hundred thousand dollars a year.

Q So approximately six hundred thousand dollars a year?

A Arising from the sale of new cars.

Q Applying Mr. Cates' formula, that would give you a

0211

MR. HARRIS: No, Your Honor.

THE WITNESS: Thank you, Your Honor.

THE COURT: What do you have next?

MR. ELLINGTON: Club Car rests, Your Honor.

THE COURT: All right. The evidence is closed,

then; is it not?

MR. PURCELL: We still have some matters, Your

Honor.

THE COURT: Is the evidence closed?

MR. PURCELL: Yes.

MR. ELLINGTON: Yes, sir.

THE COURT: That was my question.

MR. PURCELL: Yes, sir.

THE COURT: Members of the jury, you are not going

to hear any more evidence. I am sure you are pleased with that.

But in any event, we have reached the point in the trial of the case where the attorneys will now address you one last time in what we call a final argument. Under our system, this is when the lawyers do their thing. This is where, by their argument, they go over the evidence they think you ought to accept that shows their side of the case is right and deserves a verdict at your hands.

Bear in mind, that is not evidence but merely the contentions of the parties. Under our system, that is their

0212

01 duty to do precisely that.

02 Now under our rules of procedure, the Plaintiff in

03 the case has the right to make an opening and a concluding

04 argument.

05 All right. You may proceed, Mr. Ellington.

06 MR. PURCELL: Your Honor, I have a motion to make.

07 THE COURT: I will permit you to do that after we

08 get through with these arguments just as if you had done it

09 now. I do not want to take up jury time when we can take

10 that up later.

11 MR. PURCELL: I understand that, Judge. But there

12 is a motion that I have to make on the evidence, not

13 about -- it's not a Rule 50 motion. It's a motion

concerning the economic testimony. And I think that the

sides, the parties, are entitled to know the Court's

intention with regard to that.

THE COURT: All right. Members of the jury, go to

the jury room.

(Jury out at 3:47 p.m.)

THE COURT: All right. Be seated.

Mr. Purcell?

MR. PURCELL: Your Honor, as to the testimony by

the accountant who testified, there is evidence only of

gross profits and gross sales. There is no testimony of

earnings or the effect on earnings.

0213

01 THE COURT: What do you say to that? What is the

02 value of his testimony when he does not take into

03 consideration the costs?

04 MR. HARRIS: The way he basically calculated it

05 was he looked the invoices, and he calculated --

06 THE COURT: I heard what he said.

07 MR. HARRIS: -- the lost profits or lost part

08 sales and the impact on the sale of new cars caused by

09 refurbished one year olds.

10 The thing I want to point out --

11 THE COURT: Mr. Harris, he clearly said that he

12 did not take into consideration the expenses in making his

13 or giving his opinion as to what was lost.

14 MR. HARRIS: Your Honor, they had the opportunity

to cross-examine him, and they had the opportunity to challenge his conclusions. I also want to point out --

THE COURT: They just did.

MR. HARRIS: -- they didn't put up any counter-witness to dispute those numbers. And they tried initially to make a Daubert motion. And they never put up any evidence to dispute the fact that the way he calculated those numbers was improper. They make a Daubert motion on the day of trial. They've had --

THE COURT: That is something else. We are talking about his testimony here, where he said he did not

0214

take into consideration the costs and expenses in arriving

at his opinion on what was lost

MR. HARRIS: Well, then he --

THE COURT: That is his only testimony.

MR. HARRIS: Then they can argue that he should

have taken that into account. That does not mean that the

testimony is not admissible.

THE COURT: That is sheer common sense.

MR. HARRIS: But, Your Honor --

THE COURT: They do not need testimony as to that.

MR. HARRIS: But, Your Honor, they can contend

that's it's improper for him to have done that. It doesn't

affect --

THE COURT: It is not improper. It just, really,

denigrates the value of his opinion.

MR. HARRIS: But, Your Honor, they didn't bring a

single expert witness in to sit in that chair and denigrate

the value of his expert opinion. That's --

THE COURT: He did it himself.

MR. HARRIS: If it was so bad, they could have

found someone to dispute it.

THE COURT: He did it himself.

MR. HARRIS: Well, Your Honor, they can challenge

that conclusion. They can argue to the jury that it's

improper. They can say --

0215

THE COURT: That is what he is doing now.

MR. HARRIS: Well, he's welcome to argue it to the jury, and he's -- he was welcome to put up contrary evidence, but he chose not to do it, and he chose to wait until the last second to dispute the testimony.

THE COURT: I am going to leave it in for whatever it is worth. But I am telling you the weakness of it.

MR. HARRIS: I understand that. I understand, Your Honor. He's more than welcome to argue. That's why we're here, to argue --

THE COURT: I thank you for that concession.

MR. PURCELL: Judge, I think under the federal rule, under the federal law, you are obligated to -- you

14 can't just let any evidence go to the jury.

15 MR. HARRIS: Now he's back to the Daubert motion.

16 MR. PURCELL: May I finish with my argument, Mr.

17 Harris?

18 You can't let any evidence go to the jury without

19 considering whether it's proper scientific evidence. And

20 this is exactly --

21 THE COURT: That is his objection; you are giving

22 a Daubert objection.

23 MR. PURCELL: I'm going to make that Daubert

24 objection all day long. There is no time that a valid

25 objection is time barred. There is no case that says a

0216

01 Daubert objection is time barred.

02 It is the Court's responsibility to exercise its

03 gatekeeper function and not let testimony like that, of $10

04 million, without considering the amount of money that it

05 takes to make $10 million, go to the jury. And --

06 THE COURT: Why not argue that point to the jury?

07 MR. PURCELL: Because, Your Honor, that's not my

08 job. It's your job not to let him have it.

09 MR. ELLINGTON: Your Honor, I am joining in his

10 objection.

11 THE COURT: I understand you are joining with

12 everything. You do not have to say it.

13 MR. PURCELL: Your Honor, it's right there in the

14 page that I gave the Court earlier on the consideration of

15 testimony, on page 281 of the reference guide of damages in

16 the reference manual on scientific evidence.

17 -- It's got a section on economic damages and what's

18 in and what's out and how you compute those damages. And

19 it's exactly how he didn't. And the jury doesn't need to be

20 dealing with $10 million today.

21 MR. HARRIS: I'm not sure what --

22 MR. PURCELL: And it's sheer orchestrating and

23 lawyer arguments about how it is or isn't the legitimate

24 standard.

25 MR. HARRIS: I'm not sure what submission to the

0217

01 Court he's referring to.

02 MR. PURCELL: The one I put back there on your

03 desk.

04 MR. HARRIS: This was submitted, apparently,

05 before, and I never -- I wasn't aware of that.

06 Your Honor, I would refer you to Rule 702. Now if

07 the expert calculates damages based on a standard accounting

08 way of calculating damages, then that amount is admissible.

09 If they want to dispute --

10 THE COURT: He never testified to that.

11 MR. HARRIS: If they want to dispute that he

12 should have deducted something, they can do that and they

13 could have to put up a witness. Why they would wait until

14 right now to ambush us when they could have filed a Daubert

15 motion six months ago after they deposed this guy twice is

16 beyond me. There is a way to do this.

17 THE COURT: Mr. Harris, you put the witness up,

18 and he testified. Now they did not have to demonstrate that

19 his opinion was worthless.

20 MR. HARRIS: Your Honor, these are good lawyers.

21 They know how the process is done. This man was deposed

22 twice. If they felt like his testimony was not -- pursuant

23 to 702, was not proper, they know how to file a Daubert

24 motion. They know how to --

25 THE COURT: That may be, but I let him testify;

0218

01 did I not?

02 MR. HARRIS: Yes, Your Honor.

03 THE COURT: And he, by his own testimony, destroys

04 the validity of it. So I am going to sustain the motion to

05 strike his opinion as to damages.

06 MR. HARRIS: Well, Your Honor, then that's the

07 equivalent of entering a directed verdict in this case.

08 THE COURT: Whatever it is equivalent to --

09 MR. HARRIS: Your Honor, if you are ruling -- they

10 have waited until the last second to bring up this issue.

11 They don't have a witness who will contradict this man's

12 testimony. He's an accountant. He has testified, and he

13 knows how to calculate damages. If they think he could have

14 deducted something from it, they can cross-examine him.

15 They did.

16 If they thought it was improper, they could have

17 put up a witness. Why they would wait until right now to do

18 this, to ambush us, I just cannot fathom.

19 THE COURT: Well, he made his motion -- I deferred

20 it somewhat -- at the conclusion of that witness' testimony.

21 MR. HARRIS: And exactly, Your Honor, if he didn't

22 know what that witness was going to say.

23 THE COURT: Why else would he have done it?

24 MR. HARRIS: He has deposed the witness twice --

25 THE COURT: That does not make any difference.

0219

MR. HARRIS: -- and he's waited until now to do this.

MR. PURCELL: Judge, we weren't even in the case when he was deposed.

THE COURT: Nevertheless, that is my ruling.

MR. HARRIS: Well, I'm at a loss as to how we proceed, Your Honor. You have, essentially, directed a verdict on damages based on his oral Daubert motion and based on the fact that there hasn't been any contrary --

THE COURT: After all, you had Mr. Murphy up here testifying, did you not, about his damages?

MR. HARRIS: He didn't testify about the damages

to his company.

THE COURT: I thought --

MR. HARRIS: Well, Your Honor, we put up a

witness, and they had the opportunity to Daubert that

witness pretrial. Is it Your Honor's --

THE COURT: Mr. Harris, you may except to the

ruling, but that is my ruling.

MR. HARRIS: Is Your Honor's ruling that the

verdict has been directed?

THE COURT: I did not say anything about that.

You are the one that is talking about directed verdicts.

I ruled out the evidence or the testimony of the

witness that demonstrates that his opinion is valueless.

0220

MR. HARRIS: Well, Your Honor, there is no testimony in the record now, since you have done that, on damages. There isn't any. You have now stricken the only damages expert. And, therefore, we cannot prove -- because you have stricken that damages expert, we cannot --

THE COURT: Mr. Murphy testified as to what he thought his damages were. That testimony is in the record.

MR. HARRIS: Respectfully, Your Honor, he didn't.

THE COURT: I have heard enough argument on that.

MR. HARRIS: I'm simply trying to find out how I should proceed, Your Honor. We have no evidence in the record on damages.

THE COURT: You are the lawyer. You are disregarding the testimony of your own client.

Bring in the jury.

MR. ELLINGTON: Your Honor, just for the record, before the jury comes in, we have a motion to bring before the Court under Rule 50. And I simply want it noted on the record.

THE COURT: We will take that up sometime later. I hate to keep the jury waiting.

MR. ELLINGTON: I understand. I hate to try Your Honor's patience, but could I simply ask for ten minutes at this point to gather my notes so I don't waste the jury's time in this closing argument?

\CIVIL ACTION NO. CV100-195
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
AUGUSTA DIVISION

CLUB CAR, INC.,
Plaintiff,

v.

CLUB CAR (QUEBEC) IMPORT, INC., and
MARTIN MURPHY,
Defendants.

and

CLUB CAR (QUEBEC) IMPORT, INC.,
Counterclaim Plaintiff,

v.

CLUB CAR, INC., PIERRE CHAMPIGNY,
EQUIPEMENTS PIERRE CHAMPIGNY, LTD.,
and INGERSOLL RAND CO.,
Counterclaim Defendants.

2/3/04

CLUB CAR QUEBEC'S MOTION TO MEND THE PRE-TRIAL ORDER

Club Car Quebec files this Motion to Amend the Pre-trial Order and shows the Court the following;

In paragraph 6 (b) of the pre-trial Order Club Car

Quebec provides a factual overview of its case. In order to assist the Court and the other parties in this matter Club Car Quebec submits this amendment to replace the current paragraph b (b). This amendment was prompted by EPC's recent Motion in Limine for Determination of Foreign Law because a review of that Motion suggests that the other parties may not clearly udetstand the specific claims that CCQ intends to present to the jury. For example, CCQ does not intend to pursue a claim for defamation, however such a claim is enumerated in EPC's Choice of Law papers. This amendment is designed purely to focus and crystallize the issues in this case for the benefit of all parties.

Proposed Amended Paragraph;

1. For approximately twenty years Club Car Quebec (CCQ) was a distributor of Club Car's new golf carts and new golf cart parts pursuant to a series of distributorship agreements approximately 1997, Club Car began to breach the distributor agreement by providing Q's competitor, Pierre Champany and his company, Equipements Pierre Champigny, with new parts and nearly new cars at below distributor pricing

2. Equipements Pierre Champigny (EPC conspired together with Club Car to breach the distributorship agreement and EPC tortiously interfered with CCQ's distributorship contract be receiving and reselling new parts and refurbished nearly new carts.

3. From 1993 until 1997 CCQ had a used car agreement under which Club Car provided CCQ a right of first refusal or a $ 100 commission on all used golf carts sold in CCQ's territory. Club Car breached that

agreement and failed to provide a right of refusal or a commission on numerous carts.

4. In 1997 Pierre Champigny insisted that Club Car terminate the used oar agreement and it did so at Champigny's urging, s a result Champigny tortiously interfered with CCQ's business relationship with Club Car.

5. Over a series of years Pierre Champigny insisted that Club Car make EPC the distributor in Quebec. He engaged in a persistent pattern of improper conduct designed to secure the distributorship from CCQ. In 2000, as a result of Champigny's improper influence, Club Car replaced CCQ with EPC as the distributor, tortiously interfering with CCQ's distributor relationship with Club Car.

6. Club Car collected Quebec sales tax from CCQ and had a fiduciary duty to CCQ to insure that the sales tax was properly remitted to the Quebec government. Club Car knowingly and willfully failed to properly remit the sales tax.

7. Before it terminated the distributorship relationship in 2000, Club Car set conditions far maintaining the distributorship and insisted that CCQ make a series of investments in the distributorship. CCQ acted in reliance on Club Car's assertions but was terminated anyway.

CIVIL ACTION NO. CV100-195

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA,
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CLUB CAR (QUEBEC) IMPORT, INC., and
MARTIN MURPHY,
Defendants.

and

CLUB CAR (QUEBEC) IMPORT, INC.,
Counterclaim Plaintiff,

v.

CLUB CAR, INC., PIERRE CHAMPIGNY,
EQUIPEMENTS PIERRE CHAMPIGNY, LTD.,
and INGERSOLL RAND CO.,
Counterclaim Defendants.

2/7/03

ORDER OF THE COURT

After hearing argument of counsel on February 4, 2003 at the pretrial hearing in the above-captioned matter; and after review of the motions and briefs, the Court finds as follows:

1. The motion by counterclaim defendants tquipements Pierre Champigny Ltd. and Pierre Champigny in limine for determination of foreign law filed January 31, 2003 is GRANTED, and the claims against those defendants will be determined by the law of Quebec.

2. The motion by plaintiff/counterclaim defendant Club Car and counterclaim defendant Equipements Pierre Champigny Ltd. And Pierre Champigny for a 12-person jury filed February 3, 2003 is DENIED.

3. The motion by plaintiff/counterclaim defendant Club Car in limine to exclude any counterclaims not raised in Club Car Quebec's Amended Counterclaim Complaint and to exclude reference to Martin Murphy's health filed February 3, 2003 is GRANTED provided that, should the state of Mr. Murphy's health during trial require an explanation to the jury, the Court will address the matter at that time.

4. Club Car Quebec's motion in limine to exclude practice with other companies to provide parts packages with used cars filed February 3, 2003 is SUSTAINED, but that portion of the motion in limine seeking to exclude evidence that Martin Murphy transferred assets to his wife, Anita Murphy, is DENIED.

5. The motion to realign the parties contained in the Consolidated and Proposed Pretrial Order is DENIED.

6. Objections to documentary evidence and objections to deposition testimony designations are referred to Magistrate Judge W. Leon Barfield.

7. The Court reserves its ruling on the issue of punitive damages and will permit the parties to supplement charges in view of the rulings heretofore mentioned.

8. The Court GRANTS Club Car Quebec's motion to amend the pretrial order filed February 3, 2003.

FILED
U.S. Court of Appeals
Eleventh Circuit
June 29, 2004
Thomas K. Kahn
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CLUB CAR, INC.,
Plaintiff-Counter Defendant-Appellee,

Versus

CLUB CAR (QUEBEC) IMPORT, INC., MARTIN MURPHY,
Defendant-Counter Claimant-Appellant,

MARTIN MURPHY,
Defendant-Appellant,

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,
Counter-Defendants-Appellees,

INGERSOLL RAND CO., LTD.,
Counter-Defendant.

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION (S) FOR REHEARING AND
PETITION (S) FOR REHEARING
EN BANC

(Opinion_____, 11th Cir., 19__,
___F.2d_____).

Before: EDMONDSON, Chief Judge, BIRCH and FARRIS*, Circuit Judges.

PER CURIAM:

The Petition(s) for rehearing are DENIED and no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for rehearing en banc are DENIED.

ENTERED FOR THE COURT:

_____
CHIEF JUDGE

*Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.